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This paper evaluates the hypothesis that exercise of collective bargaining rights by federal employees prevents effective functioning of the federal government and endangers our national security. It argues that federal workers engaging in collective bargaining do not endanger the national security. It discusses the history of federal sector collective bargaining, its successes and shortcomings and demonstrates that the Federal Service Labor-Management Relations Statute (FSLMRS), which provides the statutory basis for federal sector collective bargaining, adequately protects the right of agencies to do what is necessary to carry out their missions and does not hamper the effective execution of government business.

It begins by examining of the nature of collective bargaining and the appropriateness of providing bargaining rights to federal workers. It next examines the legal history of federal sector bargaining culminating with passage of Title VII of the Civil Service Reform Act of 1978. It analyzes those sections of Title VII that give federal agencies the requisite flexibility needed to accomplish their missions.

It examines the practical, real-world impact of collective bargaining on employee-management relations in the federal sector and shows that the objectives of Title VII have largely not been realized. It focuses on how the limited nature of bargaining in the

federal sector has resulted in a system where minor issues become contentious and, with no pressure on either side to settle, drag on for years. It discusses how this problem is the cause of much of the hostility towards federal employee unions and collective bargaining and creates a mindset that sees them as obstructionist organizations that hamper the government's ability to carry out its essential functions and threaten national security.

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Federal Sector Collective Bargaining and the War on Terror

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I. INTRODUCTION

The proper scope of collective bargaining in the federal sector has been the subject of an ongoing, nearly century long debate. Although the right of federal workers to organize and bargain collectively has been formally recognized for the past forty years it has remained a contentious topic and the right of federal sector workers to bargain has not been as well settled as that of those in the private sector.

The debate was renewed with vigor during the effort to pass legislation creating a Department of Homeland Security following the terrorist attacks on the United States on September 11, 2001. Many saw an increased need for managerial flexibility at the federal level to combat the war on terror and argued that collective bargaining hampered the government's ability to discharge its duties. The labor unions that represent federal workers vigorously opposed efforts to restrict their rights and a lengthy political debate ensued.

At issue was whether the right of federal employees to organize and collectively bargain is incompatible with, or somehow threatens, our national security. Nobody denies that federal sector bargaining has become too legalistic and adversarial spawning contentious and lengthy litigation over minor disputes. However, no connection between bargaining and threats to our security has been established. This paper will discuss the current framework of collective bargaining in the federal government and demonstrate that it does not and could not hamper national security.

As the status of, and receptivity to, federal sector bargaining depends on who occupies the White House, Part II will begin with President Bush's position and his stormy relationship with organized labor. It lays out the factual foundation for the issue highlighting the congressional debate over federal sector bargaining and its relationship to national security.

Part III examines the nature of collective bargaining and the appropriateness of providing bargaining rights to federal workers. Are the differences between the public and private sectors too great to apply collective bargaining to the public sector? Can a sovereign engage in meaningful bargaining? Is it possible to for the government to strike the right balance and meet its primary duty of protecting the citizenry while bargaining with the employees charged with carrying out that duty? This Part explains that there is a place for federal sector bargaining and it is possible for the government to meet these challenges.

Part IV will examine the legal history of federal sector bargaining. The law in this area has been extensively developed over the last century. To understand the current landscape it is necessary to have a solid understanding of how we got here; the historical positions of the government; the evolution of federal sector bargaining from an era of strict prohibition to gradual acceptance, to full fledged support via presidential executive order; and finally, through codification with the passage of Title VII of the Civil Service Reform Act of 1978.

Part V will examine the provisions of Title VII in detail with particular reference to the scope of bargaining, the obligation to bargain, and the remedies which can be ordered in an unfair labor practice proceeding. It will analyze those sections of Title VII that give federal agencies the requisite flexibility they need to accomplish their missions.

Part VI will review the practical, real-world impact of collective bargaining on employee-management relations in the federal sector and show that the objectives of Title VII have largely not been realized. It will focus on how the limited nature of bargaining in the federal sector has resulted in a system where minor issues become contentious and, with no pressure on either side to settle, drag on for years. It will discuss how this problem is the

cause of much of the hostility towards federal employee unions and collective bargaining and creates a mindset that sees them as obstructionist organizations that hamper the government's ability to carry out its essential functions.

II. FEDERAL SECTOR BARGAINING POST SEPTEMBER 11, 2001

A. President Bush v. Labor

While campaigning on behalf of a republican congressional candidate prior to the November, 2002 elections, President Bush spoke of the effort then underway in the United States Congress to pass legislation for the creation of a new Homeland Security Department. The President said the legislation was stuck in the Senate because, "they want to have a thick book of rules that will tell the executive branch and this administration and future administrations how to deal with securing our homeland."[1]

The President was speaking of the effort of some Senators to include a provision in the legislation that would have protected the existing collective bargaining rights of federal workers who transferred to the new department. Specifically, they wanted the bill to say federal workers who had collective bargaining rights would not lose rights when their positions were transferred to the new department, unless a change in the nature of their work required it.

The issue was a sticking point in the legislation and the President had been pressing his case for months that that the system took too long to hire people, pay them according to

[1] President George W. Bush, Address at Rick Renzi for Congress Dinner (September 28, 2002), The President reiterated these remarks at several campaign appearances in other addresses.

their contributions, and hold them accountable for poor performance.[2] He believed the nation faced an unprecedented threat and that he needed "flexibility" to move people and resources quickly to respond to threats and to put the right person in the right place at the right time, but insisted that it could be done without undermining basic worker protections.[3] The President continued:

> Now, let me tell you just what I'm talking about so you'll understand. After September 11th, the Customs Service wanted to require its inspectors at our nations 301 ports of entry to wear radiation devices so they could -- these guys would have them on their belts, and if there was -- somebody was trying to smuggle a weapon of mass destruction into our country we'd know about it. If somebody was trying to bring something in illegally, across the border, we would know about it, through the radiation detection device. The union that represents the customs workers objected to this common sense action. They didn't like it and they sought to invoke collective bargaining, which would have taken a year to resolve. See it's those kinds of rules which bind the capacity of the executive branch to do the job you want us to do. In order to locate the employees in cases of emergency, the Customs Service sought to have employees provide their home addresses and their telephone numbers to the Customs Service. That makes sense. If you've got somebody you think may be getting ready to hit us and you need to move one of your Customs employees into a spot of action, you need his phone number. The union objected to listing the phone numbers, and said such a request would violate the privacy rights of workers. They actually filed a grievance and sought to negotiate something as sensible as this request. We do not need rules and bureaucracy to entangle us in the job you wanted us to do. Protection of the homeland is more important than the special interests in Washington D.C.[4]

The President's remarks made his position clear; the exercise of collective bargaining rights can prevent the effective functioning of the government and endanger our national security. Given the nature of government and some of its essential security functions it has long been recognized that there are some agencies where it would not be appropriate to allow

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[2] President George W. Bush, Remarks on Creation of Homeland Security Department at Mt. Rushmore, South Dakota, (August 15, 2002).
[3] President George W. Bush, Remarks on Creation of Homeland Security at Dwight D. Eisenhower Executive Office Building, (July 26, 2002).
[4] Bush, *supra* note 1.

collective bargaining.[5] Additionally, although federal law now guarantees the right of federal workers to join labor organizations and to engage in collective bargaining with respect to the conditions of their employment,[6] the President has the power to exclude any agency or subdivision thereof from the law if he determines that it has as a primary function intelligence, counterintelligence, investigative, or national security work and he determines the law cannot be applied the agency or subdivision in a manner consistent with national security requirements and considerations.[7]

The right of a president to make that determination and exclude an agency or subdivision had not stirred much prior interest and former presidents had exercised the power almost routinely.[8] But the uneasy relationship between President Bush and organized labor led some to believe that the President would misuse the events of September 11th by using national security concerns as a justification to remove collective bargaining rights for the entire department.

Throughout the push to create the department the administration's spokesmen talked of the need for "flexibility" in the face of the new terror threat.[9] The fear of the unions and some

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[5] See discussion *infra* Parts IV.C,D, V,B.

[6] 5 U.S.C. §§7101-7135.

[7] See *id.* § 7103(b)(1).

[8] E.g., President Carter excluded the Secret Service and the investigative divisions of the Customs Service and Internal Revenue Service; President Reagan excluded Department of Energy employees working on defense-related programs, all Drug Enforcement Agency domestic field offices and intelligence units, and Marshall's Service units responsible for special operations, enforcement operations, threat analysis, witness security, enforcement and court security, the Federal Air Marshals; President George H.W. Bush extended Carter's order covering Customs service enforcement personnel and exempted Federal Emergency Management Agency employees working in the National Preparedness Directorate, and barred workers at the Defense Mapping Agency who were under the operational control of the Joint Operational Special Operations Command, and President Clinton excluded employees of the Naval Special Warfare Development Group.

[9] E.g., Homeland Security Director Tom Ridge said "[I]f you limit the ability of the president to move people around within this organization ... you will not have done everything you can to protect this country and our way of life." CBS The Early Show, September 3, 2002; Office of Homeland Security Director for Policy and Plans, Richard A. Falkenrath, in remarks at *Homeland Security: The Whitehouse Plan Explained and Examined*, Brookings Institution Forum, (September 4, 2002) stated, "The old system simply does not fit ... the Department of Homeland Security needs flexibility to redefine the jobs and pay scales and to reward good performance."

of their backers in the Congress was that the President's call for flexibility in the new department was a code for "no unions."[10]

Shortly after taking office, President Bush took several actions that were counter to the interests of labor.[11] Most of the actions involved using his authority to intervene in or prevent strikes. But it was in executive branch agencies where the executive has great strength and the unions have limited rights where the President took his strongest action.[12]

One of the President's first actions was the issuance of an Executive Order ending the Federal Sector Labor-Management Partnership Program.[13] The partnerships, created by a prior order issued by President Clinton,[14] were a victory for labor and required federal agencies, among other things, to bargain with their employee unions over what are called "permissive" topics under the Federal Service Labor-Management Relations Statute (FSLMRS), such as the numbers types and grades of employees, and the technology, means and methods used to perform work in federal agencies. Their rescission angered unions because the creation of the partnership councils was, in part, political payback for the union's acceptance of downsizing in the federal workforce by 430,000 jobs, roughly 19.5 percent, from 1993 to 2000.[15] The provisions of the Executive Order that expanded the scope of bargaining were controversial and many federal agencies with poor labor relations simply ignored them prompting President Clinton, in turn, to issue a memorandum reaffirming and expanding the order and requiring agencies to issue reports on the status of their labor-

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[10] Jim Drinkard, *Unions Say Bush Blocking Them*, USA Today, June 12, 2002, at 8.
[11] Brian Friel, *Labor Pains*, Government Executive, October 1, 2002 at 20; The actions included blocking more strikes than any president in recent history, issuing Executive Orders repealing labor rules opposed by federal contractors and repealing a federal contracting rule requiring government procurement officials to consider a companies' labor record before awarding them contracts.
[12] *Id.*
[13] Exec. Order No. 13203, 66 Fed. Reg. 11,227, (Feb 22, 2001).
[14] Exec. Order No. 12871, 58 Fed. Reg. 52,201, (Oct 6, 1993).
[15] Friel, *Supra*, note 11 at 24.

management partnerships to the Office of Management and Budget.[16] Union leaders viewed their rescission as a step backward.

On the same day the partnership councils were ordered abolished the President issued other executive orders counter to the interests of organized labor.[17] Responding to the Executive Orders AFL-CIO President John J. Sweeney said he was "appalled and outraged" by the decision to issue "four mean-spirited, anti-worker Executive Orders sought by "the President's corporate contributors and right wing ideologues" and that the President's actions broke an understanding labor leaders had with the White House to engage in prior discussions regarding any changes whether he they were in agreement or not.[18] The White House defended all four Executive Orders as being "based on the principles of fair and open competition, neutrality in government contracting, effective and efficient use of tax dollars and the legal right of workers to be notified how their dues may be used."[19]

Many union officials viewed the President's orders as the opening salvo in the administration's assault on collective bargaining rights, but the dissolution of partnership councils and the other orders were nothing compared with the growing belief among labor representatives that the Bush administration was taking every opportunity to bust unions in the federal sector."[20] Soon after the events of September 11, 2001 their belief was partially validated when the President issued an Executive Order exempting employees of five Justice

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[16] Gov't. Empl. Rel. Rep (BNA) Vol. 39, No. 1900, (Feb 27, 2001), at 251.
[17] Exec. Order No. 13201, 66 Fed Reg. 11221 (Feb 22, 2001) required government contractors to post notices informing employees of their rights under *Communication Workers v. Beck* (In *Beck*, the Court held that union-represented workers who pay agency fees in lieu of union dues cannot be forced to contribute to union expenditures not related to collective bargaining, contract administration, or the administration of grievances). Exec. Order No. 13202, 66 Fed. Reg. 11225, (Feb 22, 2001) restricted the use of project labor agreements, Exec. Order No. 13204, 66 Fed. Reg 11228 (Feb. 17, 2001) which revoked an earlier order protecting the jobs of certain janitorial workers, from contracting out. See, Gov't. Empl. Rel. Rep. (BNA) Vol. 39, No. 1900, (Feb 27, 2001) at 252.
[18] Gov't Empl. Rel. Rep (BNA), Vol 39, No. 1900, Feb 27, 2001, at 251.
[19] Statement of White House Press Secretary, Ari Fleischer, *id*, at 252.
[20] Friel, *supra*, note 11, at 20.

Department subdivisions from the collective bargaining provisions of Title VII.[21] The order affected thousands of federal employees and the unions representing them were informed their employee locals were dissolved and their collective bargaining agreements were no longer valid.[22] Many of those affected by the order were clerks, receptionists and messengers who had enjoyed statutory collective bargaining rights for twenty-five years.[23]

Union leaders claimed the President was "cynically using the tragedy of September 11 to engage in union busting,[24] and that "it was absurd for the President to assume that union represented federal employees are any less concerned about terrorism than other Americans.[25] The timing of the order also offended union leaders because it was issued on the same day the FLRA convened a hearing to consider a petition by the employees of the U.S. Attorney office in Miami to unionize under the National Treasury Employees Union (NTEU).[26]

Responding to the President's public comments about collective bargaining stated above, union leaders accused him of spreading misinformation to further his effort in the Congress to get the homeland security legislation passed. NTEU president Colleen M. Kelley objected to the President's oft-cited remarks about the Customs Service saying they were inaccurate and misinformed. Kelley said when the Customs Service notified NTEU of its

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[21] Exec. Order No. 13252, 67 Fed. Reg. 1601, (January 11, 2002) stated that employees of U.S. Attorney's offices, the Department of Justice' criminal division, Interpol, the National Drug Intelligence Center, and the Office of Intelligence Policy would no longer be covered by 5 U.S. C., Chapter 71. The order stated that employees in those organizations had a primary function of intelligence, counterintelligence, or national security work, and that the federal service labor-management relations statute could not be applied to them due to national security concerns.

[22] Gov't Empl. Rel. Rep. (BNA) Vol. 40. No. 1943 January 15. 2002, at 59.

[23] Stephen Barr, *White House is Moving In Ways That Make Unions Uneasy*. Washington Post, January 10, 2002, Page B02.

[24] Gov't Empl. Rel. Rep., *supra*, note 22, at 59.

[25] *Id.* at 60.

[26] The DOJ and the NTEU were involved in a dispute over the union's attempt to organize the the U.S. Attorneys in the Miami area. The order caused the hearing to be suspended and union officials believed the administration should have allowed the F.L.R.A. to make a determination whether giving the employees collective bargaining rights would interfere with national security functions rather than issue an order to resolve the issue.

intention to phase in a policy making it mandatory for Customs inspectors to wear the radiation detection devices the NTEU suggested it be done voluntarily because of training concerns, but that after receiving assurances from the agency concerning employee training the NTEU did not object to the proposal and at no time did NTEU or its members refuse to implement the policy.[27] Regarding the President's mention of the union's objection to the release of Customs' employees names and telephone numbers, Kelley said that in 1999 the employees objected to the request for contact information on privacy grounds, that the Agency exercised its authority to unilaterally implement it and simultaneously negotiate the implementation with the union, and that the union dropped its objections to the policy after the attacks of September 11th.[28]

B. Federal Agency Actions Resulting from September 11, 2001

The war on terror forced many federal agencies to reexamine the methods and manner in which they did business.[29] Based on the events of September 11th, the head of the National Imagery and Mapping Agency (NIMA), James Clapper, used his authority under the law that created the Agency to abolish collective bargaining rights.[30] Congress generally excludes employees in intelligence units from collective bargaining rights, but permitted unions to be grand fathered in when it created NIMA because most of its employees transferred in from the

[27] Gov't Empl. Rel. Rep (BNA), Vol. 40. No. 1979, (October 8, 2002) at 978.
[28] *Id.*
[29] Stephen Barr, *National Security Concerns Wipe Out Union Rights at Mapping Agency*, Washington Post, February 10, 2003, at B02.
[30] *Id.*

Defense Mapping Agency which was not involved in intelligence work and allowed unions in the workplace.[31]

Defending its actions the Agency stated the nature of the job had changed because in the future the Agencies cartographers would combine map and chart information with material provided by intelligence sources to aid in the war on terror.[32] Union officials responded that the decision was related more to government outsourcing than intelligence matters.[33] The outsourcing of federal jobs to private contractors has been a major affront to federal labor unions leaders many of whom believe the Bush administration wants to restrict the power of unions so it will be easier to contract out federal jobs. American Federation of Government Employees (AFGE) President Bobby Harnage decried the NIMA decision as falling in line with President Bush's anti-union policy. Harnage stated, "if Bush can't strip hard-working federal employees of their collective bargaining rights, then he'll privatize their jobs" and accused Clapper of "invoking the terrorist attacks of September 11, 2001to cloak his union busting with a respectable cover."[34]

The first indication of how collective bargaining may be handled in the Homeland Security Department came when collective bargaining rights were denied to passenger screeners at the newly created Transportation Security Administration (TSA). In the wake of September 11, there was an intense lobbying effort to federalize the airport's passenger screeners, a function previously contracted out to private companies and paid for by the

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[31] *Id.*

[32] *Id.*

[33] See comments of AFGE spokeswoman Diane Witiak that NIMA has been engaged in large-scale privatization over the last few years which results in contractors, who may be unionized, working side-by-side with NIMA employees who may not. Brian Friel, *Spy Agency Busts Union,* Government Executive Daily Briefing, (February 4, 2003), at http://www.govexec.com/dailyfed/0203/020403b1.html.

[34] Press Release, Statement of AFGE President Bobby L. Harnage on NIMA's Decision to Terminate Collective Bargaining Rights, (February 3, 2003) Harnage continued, saying "we are here to remind Clapper that the fight against terrorism, in which federal employees have always been on the frontlines of the homeland is about preserving our freedoms - including the right to organize - not destroying them.

airlines.[35] The airlines had wanted for years to remove themselves from their security responsibilities simply to eliminate the extra expense,[36] and after Sept 11 passenger screening was seen by many as an essential national defense function.[37] When they began to assert that federalizing the workers would improve the screening function the Congress reacted swiftly.[38]

Anxious to pass legislation by the one-month anniversary of the terrorist attacks the Senate rushed through a bill, including a provision that federalized airport screeners, but action was delayed in the House where the decision to federalize passenger screening was more contentious.[39] The opposition to federalizing the workers was eventually overcome and on November 16, 2001 the House and Senate approved the Aviation and Transportation Security Act, which created the TSA and gave it responsibility for airport security.[40]

On January 9, 2002 the Under Secretary of Transportation for Security, James Loy, signed an order precluding collective bargaining at the new Agency after determining that "mandatory collective bargaining is not compatible with the flexibility required to wage the war against terrorism."[41] The order continued, "fighting terrorism demands a flexible workforce that can rapidly respond to threats ... that can mean changes in work assignments and other conditions of employment that are not compatible with the duty to bargain with labor unions.[42]

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[35] Tara Branum & Susanna Dokupil, *Security Takeovers and Bailouts: Aviation and the Return of Big Government*, 6 Tex. Rev. L. & Pol. 431, 454-457 (2002).
[36] *Id.* at 456.
[37] *Id.*
[38] See, Perry Flint, *Airport Security Perils and Options*, Wash. Times, (Oct 12, 2001), page A21. Though passenger and baggage screening became a hot issue after September 11, none of the weapons believed to have been used by the hijackers was prohibited by Federal Aviation Administration regulations and no screeners failed to properly perform their duties.
[39] Branum & Susanna, supra note 35, at 458.
[40] Aviation and Transportation Security Act, Pub L. No. 107-71, 101(a) 115 Stat. 597 (2001).
[41] Transportation Security Administration Press Release, TSA's Loy Determines Collective Bargaining Conflicts with National Security Needs, (January 9, 2003).
[42] *Id.*

Loy's order came in response to petitions filed with the FLRA by the AFGE requesting elections to designate the union as the exclusive representative of TSA security screeners at New York LaGuardia and Baltimore Washington International. The AFGE wasted no time responding. The day after Loy issued his order the AFGE filed a lawsuit in federal district court challenging the TSA's decision and seeking a declaratory order that Loy did not have the statutory authority to issue the directive.[43] Though to many it was a foregone conclusion that collective bargaining would be prohibited at the agency, unions saw Loy's actions as just one more attempt by the administration to use national security as a smokescreen to bust a federal union.[44]

Since the ban on collective bargaining at TSA and the grant of flexibility regarding collective bargaining in the law creating the homeland security department[45] were both done in the name of national security, it was only a matter of time before the Department of Defense asked for similar consideration. After all, if agencies with a quasi-security function were entitled to increased flexibility in the name of national security who would deny it to an agency with a purely national security function?

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[43] Complaint for Declaratory and Injunctive Relief, American Federation of Government Employees, AFL-CIO and James E. Ferace v. James M. Loy, Civ. Action No. 1:03-CV-00043 (RMC). The AFGE Brief asked the court to declare the directive deprives affected federal employees of their right to free speech and association under the First Amendment and to equal protection under the Fifth Amendment to the United States Constitution. They also sought a declaratory judgment that the directive is contrary to the Aviation and Transportation Security Act, Pub L. 107-701, and is otherwise arbitrary and capricious agency action in violation of the Administrative Procedure Act, 5 U.S.C. § 706 and sought an order enjoining the defendant and his agents, from implementing the directive.

[44] See Paul C. Light, *The Last Word: A Come from Behind Victory*, Government Executive Magazine, (March 2003) at 78, Light states that Loy had little choice in issuing his order because House Republicans, who opposed federalizing screeners, would not have lifted a hiring freeze previously imposed by the House Appropriations Committee without it. The freeze was imposed after TSA filled its first 45,000 positions and it was feared too large a bureaucracy was being created. Further, President Bush would have issued the ruling if Loy hadn't.

[45] This is discussed in detail in Part II.C.

Shortly after passage of the Homeland Security Act it was learned that Defense Department officials were writing similar legislation to give them wide flexibility similar to that which the Homeland Security Department would enjoy.[46]

The Bill the DoD sent to Congress incorporates policy and personnel reforms including modernizing the personnel system to allow for easier retention and recruitment and granting new flexibility over the civilian workforce. It also grants the Defense Secretary considerable authority and leeway in crafting collective bargaining relationships.[47] In support of the Bill, Pentagon officials argued that they need increased flexibility, similar to that given to Homeland Security, to carry out their mission.[48]

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[46] See, Paul C. Light, *Unleashing Reform*, Government Executive Magazine, (February 2003) at 74, detailing information in e-mails obtained from Defense Department members prior to the proposal becoming public. In one, a senior Defense official speaking of the pending proposal wrote, "If you want to rewrite the book, here is your chance."

[47] The proposed bill, §9902 (e)(2) "National Level Collaboration, provides: The Secretary may, at the Secretary's discretion, engage in any and all collaboration activities described in this subsection at an organizational level above the level of exclusive recognition. §9902(f) Provisions Regarding National Level Bargaining. - (1) Any human resources management system implemented under this chapter may include employees of the Department of Defense from any bargaining unit with respect to which a labor organization has been accorded exclusive recognition under chapter 71 of this title. (2) For any bargaining unit so included under paragraph (1), the Secretary at his sole and exclusive discretion may bargain at an organizational level above the level of exclusive recognition. Any such bargaining shall (A) be binding on all subordinate bargaining units at the level of recognition and their exclusive representatives, and the Department of Defense and its subcomponents, without regard to levels of recognition; (B) supersede all other collective bargaining agreements, including collective bargaining agreements negotiated with an exclusive representative at the level of recognition, except as otherwise determined by the Secretary; (C) not be subject to further negotiation for any purpose, bargaining at the level of recognition, except as provided by the Secretary; and (D) except as otherwise specified in this chapter, not be subject to review or to statutory third-party dispute resolution procedures outside the Department of Defense, "*The Department of Defense Transformation for the 21st Century Act*, Submitted to the Speaker of the House J. Dennis Hastert by Memorandum from the General Counsel of the Department of Defense, William J. Haynes II, April 10, 2003 including the Bill, submitted as "*Defense Transformation for the 21st Century Act of 2003.*"

[48] Testifying before the Senate Armed Services Committee, David Chu, Undersecretary for Personnel and Readiness in the Defense Department, said; "We are working to promote a culture in the Defense Department that rewards unconventional thinking - a climate where people have freedom and flexibility to take risks and try new things ... most would agree that to win the global war on terror, our armed forces need to be flexible, light and agile - so they can respond quickly to sudden changes. Chu said that personnel procedures outlined in the 1978 Civil Service Reform Act had not kept pace with national security realities adding, "Managers should be able to alter an employee's job responsibilities quickly if the security situation changes." Testimony of Undersecretary of Defense for Personnel and Readiness, Donald Chu, before the Senate Armed Services Committee as reported in GovExec.com Daily Briefing, *Defense Pushes for More Flexibility to Manage Civilian Employees, (*March 14, 2003) at www.govexec.com/dailyfed/0303/031403a1.htm.

Union leaders and their allies in the House quickly denounced the bill as excessive.[49] The House, notwithstanding their opposition, approved a slightly modified version of the bill, which retained the collective bargaining provisions.[50]

Testifying in support of the measure in the Senate, Secretary of Defense Donald Rumsfeld said the current system was too bogged down in bureaucracy to be either efficient or effective and that a new system was needed to effectively manage the department's civilian employees.[51] In a statement with far reaching implications Rumsfeld said, "We are simply asking that Congress extend the same kinds of flexibility it gives us in managing men and woman in uniform to the management of civilians who support the U.S. military.[52] The Senate, concerned that some of the proposals went too far, did not include the far-reaching provisions in its authorization of the bill. However, on June 2, 2003 a bipartisan compromise bill that grants most of the flexibility that the Pentagon is seeking was introduced.[53]

With the TSA order now the subject of a constitutional challenge in federal court and the proposals for the DOD being hashed out in the Congress it is too early to tell what the final outcome of the national security-collective bargaining debate will be. Those matters and

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[49] AFGE President Bobby Harnage, appearing before the Senate committee, testified the bill would give the Secretary of Defense too much latitude in the hiring, firing and promotion of personnel creating a system where each new Secretary could apply different rules creating a revolving and politicized workforce whose structure could threaten national security. See, Senate Government Affairs Committee Hearing, entitled *Transforming the Department of Defense Personnel System: Finding the Right Approach*, (June 4, 2003); In an April 29, 2003 hearing of the House Subcommittee on Civil Service and Agency Organization, Representative Steny Hoyer said the bill reflects the administrations opposition to worker's rights to organize. The bill, Hoyer said, "Sends a terrible message to the federal employees who are protecting our nation that their union membership could somehow be a threat to the country they defend and love."

[50] H.R. 1588, 108th Cong. (2003).

[51] Rumsfeld's testimony before the Senate Government Affairs Committee as reported in *Rumsfeld: Defense needs personnel reform to manage better*, GovExec.Com, (June 4, 2003) at http://www.govexec.com/dailyfed/0603/060403t1.htm.

[52] *Id.*

[53] S.1166, 108th Cong (2003).

the lengthy and contentious debate over the creation of the Homeland Security Department revealed a deep-seated opposition to what unions do at the federal level. It also shined a light on the clear political divisions that color any discussion about federal workers and their right to organize and engage in collective bargaining.

Debating the proper role of unions in the federal government is an almost entirely partisan activity. It goes without saying that once elected to the Congress all politicians devote their energy to advancing the interests and protecting the rights and privileges of those who helped them get there, and in recent years organized labor has been the biggest financial contributor of so called "soft-money" to the Democratic Party.[54] In the last presidential election year, 2001-2002, organized labor gave over thirty-seven million dollars to the Democratic Party compared with a little over five-hundred thousand to the Republican Party.[55] In the past four years the American Federation of State County and Municipal Employees has been the largest single contributor to the Democrats giving over sixteen million dollars.[56]

Not surprisingly organized labor gets much more support for its issues from Democrats than Republicans.[57] But there is something amiss when the fortunes of federal employees vary depending on which party holds the Congress and the Whitehouse. That is precisely the type of problem that federal-sector labor law reform was meant to end. It also

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[54] Top soft money donors available at www.commoncause.org/laundromat/stat/topdonors01.htm.
[55] *See, id,* In 1999 -2000 the numbers were thirty -two million to Democrats and four-hundred thousand to Republicans.
[56] *Id.*
[57] During the debate over the Homeland Security Act, Senator McConnell asked, "So why are our colleagues on the other side advancing the labor union's agenda? Four of the five major public sector unions ... have showered over 93 percent of their campaign contributions to the Democrats. The fifth contributed 87 percent. Here are the top contributors ... AFSMCE contributed 99 percent of their funds to Democrats; American Federation of Teachers, 99 percent; International Association of Fire Fighters, 87 percent; American Federation of Government Employees, 93 percent; and National Treasury Employees union, 94 percent. 148 Cong. Rec. S9685 (October 1, 2002) (statement of Sen. McConnell).

fosters creation of a never settled federal sector labor policy which serially grants and withdraws rights to workers, instead of a consistent, coherent labor policy.

The passage of the Homeland Security Act revealed just how deep the divisions are and how entrenched in their opposition to federal employee unions some members of Congress are. What should have been a serious discussion about the proper role of unions and bargaining in the new department became one where facts were misrepresented and federal workers were lampooned, particularly in the Senate.

C. Creation of the Homeland Security Department

1. Background

> Have you heard the one about the drunk Border Patrol Agent? Obviously, he walks into a bar. But then he goes to work and, still intoxicated, lets a terrorist into the country. The punch line is he doesn't get fired, at least not for 30 days. Or maybe it's 540, depending on who's telling the story.[58]

This anecdote was heard repeatedly in Washington during the congressional debate over creation of the Homeland Security Department; Office of Personnel Management (OPM) Director Kay James Cole, White House Press Secretary Ari Flesicher, and several senators all used it when pressing their case for a departmental waiver from the federal government's personnel system.[59] The moral of their story: it takes too long to fire people in the federal government, and in the national security area that can be fatal.[60]

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[58] Brian Friel, *Unshackled,* Government Executive Magazine, (November 2002), at 47.
[59] Id at 47; 148 Cong. Rec. S8708 (Sept 18, 2002) (statement of Sen. Miller).
[60] Friel, Supra, note 58.

When President Bush sent his proposal[61] for the creation of a new Homeland Security Department to the Congress it authorized the Secretary, in coordination with OPM, to adopt regulations for a new human resources system. The only guidance provided for the system, which would replace all the existing civil service rules in title 5, United States Code, was that it be "flexible, contemporary, and grounded in the public employment principles of merit and fitness.[62] Although the plan was short on details, the President insisted it would not undermine basic worker rights. In a White House speech promoting the proposal the President stated, "Workers will retain whistle-blower protection, collective bargaining rights, and protection against unlawful discrimination.[63]

Because the President created his plan without any consultations with the departments that would be consolidated, it was believed the flexibility requested sprang more from ideology than from a careful look at what was needed to create the new department.[64] When the bill was taken up, some House members took issue with the proposed rollback of civil service protections saying it would foster the corruption, favoritism, and low morale that were the reasons the civil service system was initially created.[65] Others complained that it would leave department employees without rights and at the whim of the Secretary.[66] There was also a feeling that rather than focus on the alleged failures at intelligence agencies to foresee and prevent the attacks of September 11th, the legislation made scapegoats of federal employees and existing workers rights. Representative Wynn, speaking in opposition to the

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[61] Prior bills had been introduced in both houses of Congress on March 2, 2002; See, H.R. 4660 and S2452.

[62] §730 of the Homeland Security Act of 2002, transmitted to the Congress on June 18, 2002, the analysis provided: Because the Department's mission includes contributing to the security of the nation and responding to existing threats and conditions, the provisions call for the Secretary and the director of the O.P.M. to create a modern, flexible, and responsive program.

[63] Steven Greenhouse, *Labor Issues May Stall the Security Bill*, New York Times, (July 28, 2002), at 22.

[64] *Impasse over Homeland Security*, The New York Times, Oct 4, 2002, at 26.

[65] 148 Cong. Rec. H5634 (July 25, 2002) (statement of Rep. Pelosi).

[66] 148 Cong. Rec. H5649 (July 25, 2002) (statement of Rep. Kilpatrick).

bill stated, "The tragedy of September 11 was linked to a lack of coordination, information-sharing, and intelligence failures not unionization and not existing grievance procedures."[67]

The President's proposal did not make any provisions for modifying existing collective bargaining rights. They became an issue when Representative Morella proposed an amendment that would have limited the President's ability to exercise his existing right under 5 U.S.C. §7103 (b)(1) to deny workers in the new department collective bargaining rights unless they were assigned new duties relating specifically to the war on terrorism.[68] The amendment stated workers that currently had collective bargaining rights would not lose them unless their job changed materially. Morella, a Maryland Republican with many federal employees in her district, feared the President would abuse his existing power to strip workers of their union protections in the name of national security.[69]

Representative Waxman, speaking in support of the Morella Amendment stated, " The Morella amendment would not be needed if the President and the administration had a track record of respecting employees' legitimate rights to organize and bargain collectively.[70] He cited the President's order effecting U.S. Attorneys saying, "if we don't pass this amendment

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[67] 148 Cong. Rec. H5654 (July 26, 2002) (statement of Rep. Wynn).

[68] H. AMDT 591 to amend H.R. 5005, offered July 26, 2002, The relevant portions of the amendment read: Sec. 762. Labor-Management Relations (a) Limitation of Exclusionary Authority (1) IN GENERAL No agency or subdivision of an agency which is transferred to the Department pursuant to this Act shall be excluded from coverage of chapter 71 of title 5,United States Code, as a result of any order issued under section 7103(b)(1) of such title after June 18, 2002, unless (A) the mission and responsibilities of the agency (or subdivision) materially change; and (B) a majority of the employees within such agency (or subdivision) have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation ,and (b)(2) Limitation Relating to Positions or Employees - No position or employee within a unit (or subdivision of a unit) as to which continued recognition is given in accordance with paragraph (1) shall be excluded form such a unit (or subdivision), for purposes of chapter 71 of such title 5, unless the primary job duty of such position or employee (A) materially changes; and (B) consists of intelligence, counterintelligence, or investigative work directly related to terrorism investigation.

[69] Greenhouse, *supra*, note 63.

[70] 148 Cong. Rec. H5801 (July 26, 2002) (statement of Rep. Waxman).

the same thing that happened at the offices of the U.S. Attorneys will happen in the new department."[71]

It was during debate in the House of Representatives that the notion collective bargaining could impede national security efforts first arose. Some saw the matter strictly as a national security issue and argued it would be dangerous to leave the President with less authority than he had under current law.[72] Others spoke in defense of union members, and their right to organize and bargain, pointing out those most regarded as the heroes of September 11th, the police and fire and rescue workers, likely belonged to unions with strong collective bargaining rights, yet that didn't prevent them from answering the call when they were needed.[73] House members questioned the notion that collective bargaining had or could have an adverse affect on national security and challenged the opposition to provide evidence that such a link existed.[74]

Despite the opposition, the Republican-controlled House quickly gave the President almost everything he asked for and passed the Act with only two days of floor debate.[75] The Morella amendment was voted down and a substitute offered by Representative Shays was passed.[76] The Shays amendment mirrored the Morella amendment, but provided an exception

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[71] *Id.*

[72] 148 Cong. Rec. H5807 (July 25, 2002) (statement of Rep. Weldon), Rep. Weldon stated "This amendment I think is extremely strange, because it basically is saying we are going to take the right that the President of the United States has to suspend collective bargaining agreements for national security purposes and we are going to deny it to the President of the United States within the Department of Homeland Security; see also 148 Cong. Rec. H5654 (July 25, 2002) (statements of Rep. Shays).

[73] 148 Cong. Rec. H5803 (July 26, 2002) (statement of Rep. Reyes); H5808 (statement of Rep. Maloney).

[74] Representative Steny Hoyer, stated, "Last month I had the opportunity to question the deputy director of the Office of Personnel Management and I asked him in the last 20 years, in the last 50 years, cold he cite me one or two or three instances where union membership ever in any instance at any time adversely effected national security? I got back a two-page letter with 11 pages of attachments. It does not cite one single incident where union membership had any adverse effect on collective bargaining ... not one in the history of of this country, or at least since we have had collective bargaining for Federal employees where national security was adversely affected. 148 Cong. Rec. H5803 (July 26, 2002) (statement of Rep. Hoyer).

[75] H.R. 5005 was passed with a 295 to 132 vote.

[76] H. AMDT 590 to H.R. 5005 was offered July 26, 2002.

that reserved presidential discretion making it essentially consistent with current law and superfluous. The exception provided the President could waive the collective bargaining provisions if he determined their application would adversely affect national security, but required him to submit written justification to the Congress.[77]

2. Senate Debate

In the Democratic-controlled Senate the debate dragged on throughout the summer and past the November 2002 elections. It was a partisan political issue from the start. Senate Republicans accused Democrats of valuing union support over national security and Democrats accused the White House of killing its own proposal to "tar the Democrats as unpatriotic."[78]

Senator Phil Gramm became the most outspoken advocate for the President's plan both on the Senate floor and in the media. His public statements encapsulated the position of the Republicans: "It's not that the Democratic leadership loves national security less it's that they love their political security more ... and they are so tied to these public employee labor unions that they're not willing to cross them on issues that have to do with the life and safety of the American people."[79] The counter argument was that the President, in refusing to compromise, was making the nations' security secondary to the administration's union-busting

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[77] The relevant portion Sec. 762(c) reads; Homeland Security - Subsections (a), (b), and (d) of this section shall not apply in circumstances where the President determines in writing that such an application would have a substantial adverse impact on the Department's ability to protect homeland security.

[78] See, David Firestone, *Threats and Responses: Domestic Security*, New York Times, (Oct 2, 2002) at 17. The Democrats had the required 51 votes to pass a compromise proposal on workers rights, but the Republican leadership filibustered and would not allow a vote on it, insisting the President's plan be voted on first.

[79] *Id.*

conservatism.[80] The issue eventually became entangled in the fall elections and some Senators who refused to vote for a plan without collective bargaining and other worker protections were tarred as being uncommitted to national security and lost their Senate seats.[81]

When the bill was taken up in the Senate the workers protections issue went front and center. Two separate amendments were offered in the hopes of breaking the stalemate and reaching a compromise, both of which slightly modified existing law to prohibit removal of collective bargaining rights from individuals unless it was established their particular job directly affected national security and the war on terrorism.[82]

Senator Lieberman proposed an amendment written to assure employees in the new Agency would keep their collective bargaining rights unless their job changed and there was a national security basis for taking those rights away.[83] It provided those workers with pre-existing rights to form a union and engage in bargaining could not have the right taken away by an agency-wide Executive Order, unless their primary duties changed to consist of intelligence, counter-intelligence, or investigative duties directly related to terrorism investigation, and it was demonstrated that their engaging in collective bargaining would

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[80] N.Y. Times, *supra*, note 64.

[81] See, Jeffrey Gettleman, *The 2002 Election; Georgia*, New York Times, (Nov 2, 2002) Section B; Page 1; Lizette Alvarez, *Goodbyes are Long for Congress's Lame Ducks*, New York Times, (November 15, 2002) Section A, Page 15. It was widely reported that Senators Max Cleland and Jean Carnahan lost their seats because of opposition to the President's proposal.

[82] SA 4471 to HR 5005 submitted on September 3, 2002, and SA 4740 to HR 5005 submitted September 25, 2002.

[83] SA 4471 to HR 5005 submitted on September 3, 2002 relevant provisions, Sec 187 (F)(1) Employee Rights (A)Transferred Agencies -- The Department, or a subdivision of the Department, that includes an entity or organizational unit, or subdivision thereof, transferred under this Act shall not be excluded form coverage of chapter 71 of Title 5, United States Code, as a result of any order issues under section 7103 (b)(1) of title 5, United States Code, after July 19, 2002. (B) Transferred employees -- An employee transferred to the Department under this Act, who was in an appropriate unit under section 7112 of title 5, United States Code, prior to transfer , shall not be excluded from a unit under subsection (b) (6) of that section unless - (i) the primary job of the employee is materially changed after the transfer; and (ii) the primary job duty of the employee after such change consists of intelligence, counterintelligence, or investigative duties directly related to investigation of terrorism, if it is clearly demonstrated that membership in a unit and coverage under chapter 71 of title 5, United States Code, cannot be applied in a manner that would not have a substantial effect on national security.

adversely effect national security. It also provided that individuals transferred to the new department, who were in units previously deemed appropriate for collective bargaining by the FLRA, would not be excluded unless their primary duties changed and consisted of intelligence, counterintelligence, or investigative duties.[84]

An amendment offered by Senator Nelson proposed a similar limitation of the President's existing power. It said no agency could have their collective bargaining rights taken away, unless it were shown that the mission and responsibilities of the agency or subdivision materially change, and, second, that a majority of the employees within the agency have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation.[85] The Nelson amendment was nearly identical to existing law, but substituted "terrorism investigation" for "national security" to prevent the President from overreaching and claiming everyone in the department had a national security function and exempting them.

The Nelson amendment garnered enough support to pass, but the Republican's who opposed it would not allow a vote and insisted the President's plan be voted on first.[86] Thus began the summer long colloquy between worker rights and presidential prerogatives.

Some argued, correctly, that the Lieberman and Nelson amendments would strip the President of power enjoyed and exercised by every president since John Kennedy.[87] They

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[84] §7112(b), Title 5, U.S.C. provides; a unit employing any individual engaged in intelligence, counterintelligence, investigative, or security work which directly effects national security shall not be determined appropriate for labor organization representation.

[85] SA 4720 to HR 5005, offered September 25, 2002, The relevant provision: Sec. 731 Labor-Management Relations (a) Limitation on Exclusionary Authority --(1) In General - No agency or subdivision of an agency which is transferred to the Department pursuant to this Act shall be excluded from the coverage of chapter 71 of title 5, United States Code, as a result of any order issued under section7103(b)(1) of such title 5 after June 18, 2002, unless -- (A) the mission and responsibilities of the agency (or subdivision) materially change; and (B) a majority of the employees within such agency (or subdivision) have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation.

[86] David Firestone, *Threats and Responses*, New York Times (October 2, 2002) Section A; Page 17.

stated also that if the amendment were included the President would be better able to execute the war on terror before passage of the Act, than after.[88] Sen. McConnell said the bill was being held up because some labor unions wanted to put their special interests ahead of the collective interests of the Nation's security.[89] He said "these unions are not fighting any increase in the President's authority to override collective bargaining agreements in the interest of national security ... no they actually want to roll back this authority.[90]

President Bush's entire cabinet signed a letter sent to the Senate demanding they approve his ability to remove collective bargaining rights in the new department. Acting Homeland Security Director Tom Ridge, said it was "perverse" that Senate Democrats would want to strengthen employees union rights in a national emergency.[91] Some of the President's supporters characterized the opposition as endangering national security simply to appease "union bosses" and keep their soft money coming in. Said one, "Union politics may be important, but it should never take the place of national security."[92] To make the case that national security would be negatively affected by collective bargaining exaggerated examples of "union work rules" prohibiting proper agency function were offered on the Senate floor. It was asserted, for instance, that the Customs Service was prohibited from reorganizing its inspection room at Logan airport, the INS prohibited from adding an extra shift at the Honolulu airport, and the Customs Service prohibited from stationing its agents where there weren't establishments necessary for the sustenance and comfort of the employees.[93] Linking collective bargaining to prevention of agency functioning Senator Gramm stated, "we are

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[87] 148 Cong. Rec. S 8709 - S8710 (October 1, 2002) (statement of Senator Gramm).
[88] 148 Cong. Rec. S 8737 (October 1, 2002) (statements of Senators Kyl and Gramm).
[89] 148 Cong. Rec. S 9685 (October 1, 2002) (statement of Senator McConnell).
[90] 148 Cong. Rec. S9685 (Oct 1, 2002) (statement of Senator McConnell).
[91] David Firestone, *Threats and Responses; Domestic Security; Homeland Security Fight Returns to Fore*, New York Times, (October 15, 2002) Section A, Page 15.
[92] 148 Cong. Rec. S8708 (September 18, 2002) (statement of Senator Miller).
[93] 148 Cong. Rec. S8736 (September 18, 2002) (statement of Senator Gramm).

talking about work rules that have been negotiated as part of union contracts that interfere with our ability to do the job in the new department."[94]

In truth, it was later pointed out by other Senators, the unions did raise objections on behalf of the workers in those matters but they did not and could not prevent the agencies from doing what they wanted to do.[95] The opposition seemed to stem from the idea that unions would even raise such issues on behalf of their members. An outraged Senator McConnell cited an alleged union "objection" to a Customs Service drug interdiction operation along the Florida coast because it would have interfered with employee vacation days.[96] Lost in this and other examples was the fact that the unions can object to whatever agency actions they wish, but they are powerless to stop the agency from carrying them out.[97]

The opponents of the collective bargaining guarantees were anxious to blame union bosses for the opposition to the President's proposal. Senator Miller stated, "It is perhaps because I have worked for $3 a day and was glad to have a job that I find their union bosses' refusal to budge for the greater good of this country so surprising."[98] If the Lieberman amendment passed it was argued, "the power of the unions, and the power of doing it the

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[94] 148 Cong. Rec. S8736 (September 18 , 2002) (statement of Senator Gramm).

[95] Regarding the disagreement at the Honolulu Airport, Sen. Durbin testified that the union and management successfully negotiated an agreement. 148 Cong. Rec. S9195 (September 25, 2002) (statement of Sen. Durbin); Responding to the allegation that a union prohibited the INS from reorganizing their inspection room at Logan Senator Kennedy said, "In fact, the collective bargaining agreement of those dedicated Custom's workers did not prevent the Customs Service from renovating the terminal. The union did not have the right to bargain over whether any renovation would take place. The agreement between the workers and the Customs Service simply provided that the workers should be notified of the change and be able to discuss the impact and implementation of the changes. Since the workers were not notified the new construction was poorly done. It left the Customs inspectors with an obstructed view, making it much harder for them to do their job well. The result was that the rate of Customs seizures subsequently went down at the airport. This case is a perfect example of how ignoring the front-line workers who protect America day in and day out will not make us safer. The workers challenged the Customs service for failing to properly notify and consult the workers and won the case before the Federal Labor Relations Authority." 148 Cong. Rec. S9674 (Oct 1, 2002) (statement of Sen. Kennedy). The statutory provisions granting agencies the authority to take necessary actions regardless of union opposition is discussed infra, Part V.B.

[96] 148 Cong. Rec. S9685 (Oct 1, 2002) (statement of Senator McConnell).

[97] See discussion infra Part V.B.3,4.

[98] 148 Cong. Rec. S8708 (September 18, 2002) (statement of Senator Miller).

same old way it has been done since the 1950's will be preserved and the power of the President in the name of national security will be reduced.[99]

Many Senators advocated on behalf of the amendment and the role of unions in the federal government. Objecting to the assertion that unions were an enemy that can interfere with the proper function of our government, Senator Mikulski asked, "why is it okay to have a union in Poland that brought down the whole communist empire and not to have one here?[100] She also questioned the characterizations of union leaders being advanced, asking, "The words labor boss what do they mean? It is okay to be a CEO and have more perks than a potentate - that is okay ... but when people organize they are called labor bosses, as though some how or the other it is a goon squad.[101]

Those who supported the amendments directly questioned the connection between union membership, collective bargaining and national security. They argued there was no connection and that "Mr. Bush is taking advantage of the opportunity to mow down longstanding worker rights and protections, saying he needs greater flexibility."[102] The administration, it was argued, "displays a contempt for workers and particularly for the federal workers who serve with dedication every day to keep our nation safe."[103] Said Senator Feingold, "I support the right of federal workers to join unions and am troubled the administration wants to strip existing union representation and collective bargaining rights from many of these workers. I am also troubled by the implication that union membership is somehow a threat to our national security.[104] Senator Breaux offered that it "would be ironic

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[99] 148 Cong. Rec. S9190 (September 25 , 2002) (statement of Senator Gramm).
[100] 148 Cong. Rec. S9196 (September 25, 2002) (statement of Senator Mikulski).
[101] 148 Cong. Rec. S9196-9197 (September 25, 2002) (statement of Senator Mikulski).
[102] 148 Cong. Rec. S9057 (September 24, 2002) (statement of Senator Byrd).
[103] 148 Cong. Rec. S9674 (October 1, 2002) (statement of Senator Kennedy).
[104] 148 Cong. Rec. S8421 (September 10, 2002) (statement of Senator Feingold).

if the agency created to protect the rights and freedoms of Americans is the agency that is utilized to take away their collective bargaining rights without an adequate justification.[105]

Arguing on behalf of the Nelson amendment, Senator Feingold said it would not hamper the ability of the President to remove collective bargaining rights if there is a valid security concern, but that "simply being an employee of a department with the word security in its name is not sufficient cause to be stripped of collective bargaining rights.[106] Senator Lieberman, citing to existing law, argued that no "union work rule" could impair a manager's authority to assign work, direct employees or take action they deem necessary to accomplish the agency mission.[107] Therefore, he continued, " the claims we have heard in the Senate about how union contracts tie the hands of managers with silly union work rules ... are simply not true."[108]

Advancing an alternative argument for opposing the Lieberman amendment, some Senators alleged not that unions could prevent agency action and impair national security, but rather that the mere nuisance of federal sector unions could not be tolerated in an agency with a national security mission. Senator Thompson stated "we spend months and years negotiating items in these collective bargaining agreements, such as the color of uniforms, whether the smoking area should be lit and heated and whether the cancellation of the annual picnic was in violation of the collective bargaining agreement."[109] He said the opposition to bargaining "is not a heavy-handed cram-down that violates people's rights ... but simply a

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[105] 148 Cong. Rec. S9201 (September 25, 2002) (statement of Senator Breaux).
[106] 148 Cong. Rec. S9688 (October 1, 2002) (statement of Senator Feingold).
[107] 148 Cong. Rec. S9196 (September 25, 2002) (statement of Senator Lieberman); The provisions which grant management such flexibility are discussed infra, Part V.B.3,4.
[108] 148 Cong. Rec. S9197 (September 25, 2002) (statement of Senator Lieberman).
[109] 148 Cong. Rec. S9376 (September 26, 2002) (statement of Senator Thompson).

response to the fact that this nation is in a different era now."[110] He argued this status quo could not be allowed in the new Department given the importance of its mission.

In response to such statements Senator Durbin accused the opponent of citing ridiculous extremes of collective bargaining rights to make their case. It is not, he said, a question about how bright the light is over the coffee pot and what color uniforms the employees in the new department wear. The question, is:

> When they come under that new roof ... will they bring with them collective bargaining rights that they have had, have earned, have worked for perhaps all of their adult lives? There are those who argue - and you have heard it from the Senator from Texas-once they come into this new department we can't afford to run the risk that someone who belongs to a labor union can really rise to the challenge of defending America. Do I recall those profiles in courage of September 11, 2001, of which so many of us are so proud? Did you stop and think for a minute that those New York firefighters, going up those stairs in those buildings to rescue people they did not know were perhaps carrying in their wallet, next to the picture of their family, a union card. Did anyone question their patriotism, their loyalty to our country, their devotion to so many people?[111]

The debate ended when the Republicans gained control of the Senate after the November election. A compromise bill was reached guaranteeing no agency or subdivision would lose their collective bargaining rights to presidential executive order unless their mission and responsibility materially changed and a majority of the employees had intelligence, counterintelligence, or investigative work directly related to terrorism investigation. It permits the President to waive those provisions if he determines they would have a substantial adverse impact on the ability of the Department to protect homeland

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[110] 148 Cong. Rec. S11016 (November 14, 2002) (statement of SenatorThompson).
[111] 148 Cong. Rec. S9212 (September 25, 2002) (statement of Senator Durbin).

security. The President may issue such a waiver 10 days after submitting a written explanation to Congress explaining the reasons for his determination.[112]

Collective bargaining may not have even been an issue had the President not invoked his power at the U.S. Attorneys' offices, an action which many saw as unnecessary. Speaking in support of the compromise bill, Senator Voinovich accurately pointed out that what the unions were really worried about was arbitrary and capricious action by the President. He argued the compromise bill should adequately address their concerns because it requires any president exercising his authority to provide his reasons for doing so, in writing, to Congress.[113]

In his last remarks in opposition to the bill Senator Lieberman referred to the heroic actions of union workers on September 11, 2001 and stated that collective bargaining rights had never come between public employees and their obligation or responsibility to do their duty.[114] The Congress, he said, "will not just sit back and watch if the President decides to remove collective bargaining rights in the new department" and "we expect the President to take such a step only if it is truly essential to national security and not a management convenience or ideological compulsion.[115] Union leaders found the compromise untenable saying the right to belong to a union should not change just because the Republicans picked up a couple of seats in the Senate.[116]

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[112] Pub. L. No. 107-296, § 842, enacting H.R. 5005, November 25, 2002.
[113] 148 Cong. Rec. S9215 (September 25, 2002) (statement of Senator Voinovich).
[114] 148 Cong. Rec. S11004 (November 14, 2002) (statement of Senator Lieberman).
[115] 148 Cong. Rec. S11103 (November 14, 2002) (statement of Senator Lieberman).
[116] David Firestone, *Threats and Response: Domestic Security; Lawmakers Move Toward Compromise Curbing Worker Rights in New Department*, New York Times, (November 11, 2002), section A, page 15.

III. COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT

It is not surprising that collective bargaining rights that have been guaranteed and taken for granted in the private sector for so long could spark so much acrimonious debate when the subject was federal workers. Some of the comments noted above reflect the historical perspective of many that unions and collective bargaining rights are simply incompatible with government service. To understand their perspective it is necessary to examine the historical arguments against public and federal sector bargaining.

The National Labor Relations Act made it clear it was the policy of the United States to encourage the practice and procedure of collective bargaining.[117] It was believed collective bargaining legislation would produce three results: eliminate the inequality of the individual labor market; reduce the need for governmental regulation to protect employees from oppressive terms, and give employees a voice in the decisions which influenced their lives.[118]

Though the Congress, through the NLRA, first authorized unionization and collective bargaining rights in 1935 it did not extend those rights to federal employees.[119] There was a persistent notion that collective bargaining was so contrary to the public interest that it could not be extended to the federal and other public sectors. The idea was so ingrained in certain quarters that those who advocated collective bargaining rights for public employees had their

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[117] National Labor Relations Act (Wagner) Act of 1935, Ch. 372, 49 Stat. 449, amended by Labor Management Relations Act of 1947 Ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. 151-169 (1988)). Section 151: It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

[118] Clyde W. Summers, *Labor Law as the Century Turns A Changing of the Guard,* 67 Neb. L. Rev. 7, 7-8 (1988).

[119] Wagner Act, supra, note 117.

truthfulness and patriotism questioned.[120] And as the recent proceedings in the Congress demonstrated the proper role, or even existence, of unions and collective bargaining in the federal sector is not well settled.

Why is it that public sector collective bargaining is so controversial? Even after collective bargaining was extended to federal and most other public employees the idea persisted that due to the unique nature of government the concept could simply not be smoothly extended to public sector. As one scholar has put it, " Public employee bargaining suffers from cognitive dissonance. There is repeated acknowledgement that collective bargaining in the public sector is different from collective bargaining in the private sector."[121]

Some resistance to public sector collective bargaining in the name of the public interest was really no different than the opposition found in the private sector. It represented little more than a simple reluctance of the public employer to share authority.[122] Nevertheless, there were valid reasons for opposition. Historically, opponents have argued that collective bargaining between the government and its employees was neither feasible nor desirable.[123] In support of that idea they made several arguments: that the sovereign nature of government prevents it from assuming the position of an employer in the normal collective - bargaining relationship, that the important decisions such as wages, hours, and conditions of employment - which are the traditionally contained in collective bargaining agreements - are almost exclusively in the realm of the legislature, and finally, they argued that management in the federal government voluntarily provided its employees the same privileges which were

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[120] Wilson R. Hart, Collective Bargaining in the Federal Civil Service 18 (1961).
[121] Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. Tol. L. Review. 265, 265 (1987).
[122] B.V.H. Schneider, *Public-Sector Labor Legislation - An Evolutionary Analysis in Public-Sector Bargaining*, in Public-Sector Bargaining (BNA Books 2d ed, Benjamin Aaron, Joyce M. Najita & James L. Stern 1990) at 189.
[123] Hart, *supra* note 120, at 11.

gained by collective bargaining in the private sector.[124] President Franklin D. Roosevelt, who generally supported organized labor, stated the position against federal sector bargaining in a now famous letter, writing:

> All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service ... The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures or rules in personnel matters.[125]

Throughout the history of employer-employee relations in the public sector the notion that collective bargaining, as it exists in the private sector, is simply irreconcilable with public service because of the nature of government persisted. Although given various expressions the central theme is that the complete transplantation of traditional collective bargaining into the governmental process would impair the decision-making power of elected officials as they seek to represent the public interest.[126] When bargaining was finally formally approved in the federal government it accommodated these concerns by severely limiting the scope of negotiable subjects.

One concern voiced by historical opponents of federal sector collective bargaining, and echoed during the homeland security debate, is the principle that managers must have unimpeded power to manage if they are going to do it effectively. Opponents argued that collective bargaining would weaken executive authority, chip away important management

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[124] See *id.* at 12.
[125] See *id* at 21, the quote is from a letter from Franklin D. Roosevelt to the President of the National Federation of Federal Employees in 1937.
[126] Schneider, *supra,* note 122 at 189.

prerogatives, and tangle the chain of command. and the anticipated result would be chaos, confusion, and futility.[127] Their argument was summarized thus:

> [W]e have a job to do. We have to govern the country. We are getting the job done under the existing ground rules. Nobody is really being seriously hurt by them. But there is no telling how well or how poorly the government will be run if meddlesome reformers impose a cumbersome and unfamiliar set of restrictive operating rules upon us in the name of 'collective bargaining'. If you want the train to run on time you shouldn't harass the engineer."[128]

The "restrictive rules" opposed by some were exactly what the employee unions desired. It has long been the cardinal principle of their orthodoxy that executive discretion in the field of personnel management is inherently evil. Anything which broadens the area in which the administrator may use his own judgment or exercise his own initiative is bad; anything which limits it is good. According to this philosophy, there is a pressing need for more and more laws which prescribe in detail the procedures which the administrator or supervisor must follow without deviation.[129]

Why was "harassing" the engineer not only acceptable for employees in the private sector, but protected by federal law? Is there a difference between private and public employees that mandates one group should have greater rights than the other?

Federal employees are the same as employees in the private sector, they have the same needs and seek similar advantages as their counterparts in the private realm, it is the nature of their employer which makes them unique and mandates that their collective bargaining must fit within the federal governments structure, and its functioning must be consistent with the

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[127] Hart, supra, note 120 at 38.
[128] *Id.* at 14-15.
[129] Hart, *supra* note 120, at 251.

government's processes.[130] Because the main concern in federal sector collective bargaining must be to maintain appropriate governmental decision-making and not reaching agreements and consensus, it has been written that the problems involved in public sector labor relations are more in the realm of political science than labor relations.[131] There are unique issues involved when the government acts as employer that do not confront its private sector counterparts. The nature and importance of many government services are such that application of the private sector system with its emphasis on give and take and trying to equalize power between labor and management would not be feasible. The bottom line is that governmental decision-making should involve doing what is in the interests of the general public and any particular group in the interests of its members should not hamper government functions.[132]

Labor-Management relations in the federal sector take place against a background of constraints different from the private sector where the pressures of the marketplace rule and the laws of supply and demand, and profit and loss, determine the terms of their settlements.[133] The federal government does not sell anything, but performs services and functions, which are essential to the American people. The result of bargaining in an area where the employer is not a manufacturer or service provider, but is responsible for the health safety and welfare of the entire nation has been tension between providing effective collective bargaining for federal employees and the government's resistance as it attempts to protect its decision-making power. When those two forces oppose one another it is the government's

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[130] Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decision Making*, 44 U. Cin. L. Rev. 669, 670 (1975).
[131] *Id.* at 671.
[132] Robert E. Hampton, Federal Labor-Management Relations: A Program in Evolution, 21 Cath. U. L. Rev. 493, 496 (1972).
[133] *Id.* at 497.

decision-making power that wins out. That is, of course, as it should be. Although federal employees should be given the same rights as their private sector counterparts whenever possible, there are times at which those rights must yield in the face of the important functions the federal government has to carry out. The main concern should not be with facilitating collective bargaining but with maintaining appropriate governmental decision-making because the ultimate concern is not to make collective bargaining work, but to make government work.[134]

The limited scope of bargaining provided for federal workers reflects those concerns. Philosophical arguments aside, the most practical argument against federal sector bargaining was based on objections to the use of the prime weapon of private sector unions, the strike. It was argued the private sector model with the right to strike could not be applied to the government due to the monopolistic nature of the services provided. A work stoppage could halt important governmental services leaving citizens with no other options. For those reasons, it was argued, public employees would have too much leverage in a strike and that if they struck the disruption of essential government services would be intolerable.[135] To accommodate this concern federal employees are prohibited by law[136] from participating in strikes, asserting the right to strike, or being a member of an organization that asserts the right to strike against the United States. There are also very broad management rights clauses reserving to government agencies all the discretion they need to carry out their essential functions.

The economic arguments against federal sector collective bargaining were not as high a hurdle to overcome. The economic arguments were not that bargaining was incompatible or

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[134] Summers, *supra*, note 130 at 672.
[135] Myron Lieberman, Public-Sector Bargaining, 25 (1980).
[136] 5 U.S.C. § 7311(3) (1976).

infeasible, but that because the legislature determines salaries, etc., and civil service protections guarded against employer oppression, it was unnecessary. It was also argued that, because the federal government was not in competition with anyone, there was no need to protect federal workers from its effects. Interestingly, some of the economic reasons for opposition to federal sector collective bargaining are losing their relevance. The protections against at-will employment which are a motivating factor in many private sector collective bargaining agreements were seen as unnecessary for federal workers because their civil service protections provided them with much greater job security than those in the private sector. But this is not as persuasive as it once was due to the increasing willingness of the federal government to respond to economic pressure by contracting out jobs. Recent presidential candidates have campaigned on the theme of making government smaller which translates into getting rid of federal employees.[137] The "flexibility" sought in the new departments leaves employees more at the whim of management and makes the need for collective bargaining greater.

A. Speaking With a Unified Voice

It is clear that, modified to meet the special needs of government, collective bargaining rights can be accommodated in the federal sector. But if the bread and butter issues are off the table and, unlike private employers, the government can refuse to bargain over most subjects, what can federal sector collective bargaining accomplish? Can it have

[137] Jason Peckenpaugh, *Tough Competition*, Government Executive Magazine, March 2003, page 35. At a June, 2000 campaign rally in Philadelphia, then presidential candidate George W. Bush promised to completely overhaul government operations and after being elected followed through on that promise with his "competitive sourcing" program which put 425, 000 civil service jobs up for competition with contractors. The largest civilian agency, the Veterans Affairs Department, will compete 53,000 jobs over the next five years.

any real meaning when there is so little left to bargain over? What is left is of great relevance to the employees because it deals with their specific job conditions and their opportunity to participate in the shaping of their day-to-day work life. The ability to have some say, however small, in their day-to-day work-life can greatly increase employee's morale. It should also be of great relevance to management because it relates to their need to get the government's work done effectively and efficiently.[138]

There are two schools of thought on why employees engage in collective bargaining. The first is the monopoly theory, which focuses on the monopolistic power of unions to raise wages and the second is the collective voice/institutional response theory which refers to the use of direct communication by management and union representatives to bring the actual conditions of the workplace closer to its desired condition. In the workplace the voice/response theory means discussing employment conditions that ought to be changed with the employer rather than quitting the job.[139]

The voice mechanism is the most important facet of collective bargaining for federal sector unions in the workplace. Collective bargaining has been described as "an orderly, democratic method of permitting maximum feasible participation of all the members in a given department no matter how large or unwieldy-in the decision-making process."[140] It is this idea of giving employees the ability to speak with a unified voice about the matters that affect their daily working lives that is most important. Early advocates of public sector bargaining picked up on this theme and argued that public-employee unions had much to contribute to the operations of their agencies and bargaining would ensure they had the opportunity to make those contributions and further that, democratic personnel administration

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[138] Hampton, *supra* note 132, at 505.
[139] Richard B. Freeman & James L. Medoff, What Do Unions Do? 8 (1984).
[140] Hart, *supra* note 120, at 233.

requires that those who are affected by policies be given an opportunity to express their views about it, prior to the policy being enacted.[141]

Although it is often characterized as obstructionism or meddling with managements prerogatives the input offered from workers can have a meaningful benefit to them and a mutual benefit for the employer. Through the voice response mechanism collective bargaining can open an important communication channel between workers and management which is likely to increase the flow of information between the two and improve the productivity of the enterprise regardless of what it is.[142]

It is for the purposes of banding together and speaking with a common voice that many people join unions in both the private and public sectors. It was pointed out years ago that people join unions for the same reasons they join churches or clubs, because "we seek the sympathetic companionship of our fellow men and want to join others on matters of common interest ... management would do well to examine carefully this proved craving of human nature. Employees would like to feel they are a part of the business too, not just on the payroll."[143] By allowing employees to speak with one voice when expressing their concerns and helping them exercise some measure of self-governance, collective bargaining helps employees differentiate themselves from the commodities of the business.

The importance of individuals having some input into what their working conditions and work rules are was offered as a reason for protecting collective bargaining in the Homeland Security Department. Speaking directly of such worker input, Senator Boxer tied voice to worker dignity stating, "I don't think any president - this one or any future one-

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[141] Lieberman, *supra* note 135, at 24.
[142] Freeman and Medoff, *supra* note 139, at 15.
[143] Hart, *supra* note 120 at 242, this quote from Charles P. McCormick in McCormick, The Power of People, .9 (1949).

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[142] Freeman and Medoff, *supra* note 139, at 15.
[143] Hart, *supra* note 120 at 242, this quote from Charles P. McCormick in McCormick, The Power of People, .9 (1949).

should interfere with that. It is very important that people have their dignity."[144] Others also argued that denying employees voice in the workplace would deprive them of their dignity. One Senator asked "how are you going to call upon people to serve above and beyond the basic requirements of their job description if you don't treat them with dignity and respect?[145] Senator Breaux warned it was contrary to national interests to deny workers some input into how decisions affecting them are made saying:

> If you are going to make management decisions do you want the people whose jobs are being changed to be involved in that decision? Or do you want to take away their collective bargaining rights and tell them arbitrarily what they are going to do? What type of worker are you going to have if you take that away and not even let them talk about what their duties are going to be? You are going to have a very reluctant workforce which is not in the interests of this country from a homeland security standpoint.[146]

B. Bargaining in a Political Environment

It is also important the collective voice of employees be heard in the political arena where their interests compete with those of others. Early advocates of public sector bargaining recognized that it was an inherently political endeavor and they saw bargaining as an appropriate way to remedy the disadvantages public employees faced arguing that equity required extending the same rights to public employees that private employees had.[147] Our political system has a built-in bias that requires public sector bargaining because the ultimate employers are the voters, the taxpayers and the beneficiaries of public services who greatly

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[144] 148 Cong. Rec. S9058 (April 24, 2002) (statement of Senator Boxer).
[145] 148 Cong. Rec. S9198 (September 25, 2002) (statement of Senator Sarbanes).
[146] 148 Cong. Rec. S9676 (Oct 1, 2002) (statement of Senator Breaux).
[147] Lieberman, *supra* note 135, at 24.

outnumber the federal workers. Collective bargaining gives employees direct access to the decision-makers to help offset the built-in political disadvantage.[148]

One of the major distinguishing features of federal level labor-management relations is that local negotiations are subsidiary to the employee benefits and protections that are granted and improved through the legislative process.[149] The federal government does not have any competitors but federal employees do. They need a voice in the political realm where they're interests compete with others. By giving them direct access to, and the ability to influence, political decision making, collective bargaining offsets the built-in political disadvantage and gives them a voice in the forum where their livelihood and standard of living are determined.[150]

Some critics have argued that federal and other public sector workers and their unions have an unfair advantage because they have an opportunity, through the political process, to play a role in determining who is management whereas their counterparts in the private sector have no role in selecting management.[151] As noted, unions recognize the lobbying influence they can have via campaign contributions and they contribute significantly. The result of course is that there are strong advocates of public sector unions and their collective bargaining rights in the congress. But this argument overlooks the fact that private-sector unions, and all other organizations with the means to contribute, are also heavily involved in the American political process.[152] Given the nature of the beast it is inevitable that unions, like all other enterprises, will seek favors for their rank and file in the Congress.

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[148] Summers, *supra* note 121, at 268.
[149] Hampton, *supra* note 132 at 502.
[150] Summers, *supra* note 121, at 268.
[151] Lieberman, *supra* note 135, at 50.
[152] William B. Gould IV, Primer on American Labor Law 177 (1986).

Some argue it is more acceptable for private sector unions to attempt to influence the Congress because there is always a business group or corporation lobbying or contributing money to counter the union message. Federal sector employees they argue are already taken care of by the Congress and do not need additional influence in the system. But this argument overlooks that, given the finite resources of the government, every financial gain or other perk gained by federal employees comes at a cost to some other interest group or program. In an era when politicians attempt to outdo one another when bashing the bureaucracy and promising to shrink the size of the federal government it is necessary for federal employees to make their voice heard at the point of decision making.

IV. HISTORY OF FEDERAL SECTOR COLLECTIVE BARGAINING

To understand the unique problems and limitations of federal sector collective bargaining it is necessary to understand its history. The historical development of unions and worker organization in the federal sector was similar to, and in many ways paralleled, that of the private sector. It was a progression from early efforts by the government to outlaw any type of representation, to a gradual willingness to allow limited representation. After allowing only limited representation for years the government progressed to allowing formal recognition, first through a string of presidential executive orders, and finally through a statute with the passage of the FSLMRS as part of The Civil Service Reform Act of 1978.

A. Early History of Worker Organization

Union activity in the federal government is not a new development. In the early nineteenth century there were numerous social and benevolent societies of federal workers but they did not carry on collective bargaining with management. Unions began to emerge and become active in the 1830's when craft offices were formed in the printing offices, navy yards and arsenals. Their initial collective effort was to limit the length of the working day. In 1835, the Naval Shipyard in Washington D.C. was the site of the first recorded work stoppage by federal employees when the shipyard's employees struck in demand for the ten -hour workday which had already been won for the private sector. The result of their efforts and other early collective efforts was the establishment of a ten-hour workday for all federal workers in 1840.[153] They also achieved pay equity when Congress passed the prevailing wage statue conforming pay in the navy yards to the to those in the private sector.[154]

Collective efforts declined after these early victories, but true unionism began to emerge in the 1880's with postal employees organizing into craft unions of letter carriers, rural carriers, post office clerks and others.[155] Trade unionism became a concern of the post office employees with the passage of the Pendleton Act of 1883 that placed the post office under a merit system. Prior to the implementation of the merit system the post office, like other federal employment, was completely political in nature with employment and advancement dependent upon political favors. The demise of spoils system resulted in a lack

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[153] Hampton, *supra* note 132 at 493.

[154] The statute declared the hours of labor and the rates of wages of the employees in the Navy Yards shall conform as nearly as is consistent with the public interest with those of private establishments in the immediate vicinity of the respective yards, to be determined by the commandants of the Navy Yards, subject to the approval of the Secretary of the Navy.

[155] Stuart M. Rosenblum and Shelton E. Steinbach, Federal Employee Labor Relations: From the "Gag-Rule" to Executive Order 11491, 59 Kentucky Law Journal Volume 833, 835 (1971).

of congressional concern for the employees, led to a decline in their working conditions and laid the foundation for the growth of postal unions. After associating with the Knights of Labor the letter carriers achieved early success and won an eight-hour workday in 1888, but they also faced formidable opposition from the Department which attempted to limit their power by prohibiting their attempts to influence legislation before the Congress.

Administrative opposition was another impediment to union development. In response to the early efforts President Theodore Roosevelt issued a "gag order" in 1902 forbidding federal employees from seeking legislation on their own behalf ender penalty of dismissal[156] In 1906 the American Federation of Labor gave a charter to the National Federation of Post Office Clerks. This was the first time a labor organization composed exclusively of employees of the federal government was affiliated with the organized labor movement and they immediately sought restoration of federal employee rights and better working conditions and pay.[157] They met stiff managerial opposition; The Postal Department responded to their efforts by interrogating, demoting and discharging union leaders and reducing crews and time-off.

As a result of these actions and those at other agencies Senator Robert La-Follette spearheaded an independent investigation that led to the enactment of the Lloyd-La-Follette Act of 1912. The passage of the Act marked the first time that union representation of federal employees was recognized in law. The Act gave federal employees the right to petition and furnish information to the Congress and protected the right of federal employees to join a

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[156] Hart, *supra* note 120, at 19, The Executive Order stated: All officers and employees of the United States of every description, serving in or under any Executive Departments, and whether so serving in or out of work, are hereby forbidden either directly or indirectly, individually, or through associations, to solicit an increase of pay or to influence or attempt to influence in their own any other legislation whatever, either before Congress or its Committees, or in any way wave through the heads of Departments or under which they serve on penalty of dismissal from the Government Service. It was later modified by President Taft in an Executive Order that prohibited federal employees from responding to congressional requests for information.

[157] Rosenbaum & Steinbach, supra note 155, at 836.

union as long as the union was not affiliated with any outside organization that imposed a duty to engage or assist in a strike against the United States.[158]

The actual impact of the Act was a disappointment due to the judicial interpretation it was given. Supporters thought union advocates who were demoted or removed from service would be reinstated upon a showing of improper employer motivation. However, the courts determined it was an unwarranted interference with administrative authority to look outside the administrative record at managerial motivation.[159] The Act failed to stop government agencies from disciplining union activists because it was difficult to prove disciplinary action was motivated by the employee's union activity.

During these early years the conflict between worker rights and the public interest began emerging. In the early statutes, Congress provided increased rights to federal workers only to the extent they were compatible with the public interest. Additionally, in the early 1990's many people began equating federal service with military service and therefore determined that it was incompatible with unionization. They feared that union membership conflicted with government service and would prevent union members from faithfully performing their duties. A general attitude emerged that equated trade unionism with disloyalty.[160]

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[158] Subcommittee on Postal Personnel and Modernization, 96th Congress, 1st Session., Legislative History of the Federal Service Labor Management Relations Statute, Title VII of the CSRA of 1978, at 1160 (Comm. Print 1978), hereinafter Legislative History.
[159] Hart, *supra* note 120, at 34.
[160] Rosenblum & Steinbach, *supra* note 155, at 839.

B. Middle years

The early and mid 1900's saw a flurry of legislative activity regulating labor relations but none of it applied to federal employees. The National Labor Relations Act of 1935, the Fair labor Standards Act of 1938, the War Disputes Act of 1935, and the Taft-Hartley Act of 1947 all explicitly excluded federal employees from their coverage. Even though no legislation protecting federal workers was passed in this period it was discussed in the Congress. During every session of Congress from 1949 to 1961 Representative George Rhodes and Senator Olin Johnston introduced bills that would have granted statutory recognition to organizations of federal employees. The bills, which were amendments to the Lloyd-La Follette Act, took varying forms, but their main provisions would have allowed unions to present grievances without fear of reprisal; required agencies to meet and confer on matters of policy effecting working conditions, safety, training, labor-management cooperation, grievances, transfers, appeals, demotions and reductions in force; and created a tripartite board of arbitration.[161]

Although the Rhodes-Johnston bills sought rather conservative goals they never even reached the floor of the House or Senate, mainly because of executive branch opposition. Commenting on the limited nature of one of the bills Senator Hubert Humphrey said it would give to federal employees, "some basic minimum rights and democratic procedures in labor-management relations and make every federal employee feel that he is considered a first-class

[161] Albert A. Blum & I.B. Helburn, Federal Labor-Management Relations: The Beginning, 26(4) J. of Collective Negotiations. 255, 256 (1997).

citizen instead of a hireling.[162] The executive branch opposed the legislation claiming; it was unnecessary; granting union officers the right to "carry on any lawful activity" was an excessively broad delegation of power to unions, and; the proposed compulsory arbitration would deprive agencies of the "minimum essential powers" necessary to supervise projects.[163]

Presidential opposition to bargaining was a consistent theme throughout this period. Though the earlier quote from President Franklin Roosevelt was meant only to express his opposition to the militant tactics used by private sector unions in the federal government, particularly strikes,[164] both he and President Truman accepted the principle that employees of the federal government should be legally denied many of the rights belonging to private sector employees. President Eisenhower did not express any official views on federal service employee-management relations or federal employee unions until his second term was almost over. His sole expression, contained in a message vetoing a pay raise for federal workers, was disdainful of the union's lobbying effort in the Congress in support of the raise.[165]

Though the Rhodes-Johnston bills were never brought to a vote in Congress they received greater support each time they were offered, thanks in large part to the increased

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[162] Willem B. Vosloo, Collective Bargaining in the United States Federal Civil Service, 47 (1966), the statement was before the Senate Committee on Post Office and Civil Service, 84th Congress, 2nd Session from, Collective Bargaining in the United States Federal Civil Service, Vosloo at 47.

[163] Blum & Helburn, supra note 161, at 257.

[164] Hart, *supra* note 120, at page 24. The next paragraph of the President's letter stated: "I want to emphasize my conviction that militant tactics have no place in any organization of Government employees. Upon employees in the Federal Service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is paramount."

[165] Hart, *supra* note 120, at 26. The message stated: I am informed that enactment of H.R. 9883 was attended by intensive and unconcealed political pressure exerted flagrantly and in concert on members of Congress by a number of ... employees, particularly their leadership. I fully respect the right of every Federal employee - indeed all our citizens - to petition the Government. But the activity of which I have been advised so far exceeds a proper exercise of that right and so grossly abuses it, as to make of it a mockery. That public servants might be so unmindful of the national good as to even entertain thoughts of forcing the Congress to bow to their will would be cause for serious alarm. To have evidence that a number of them ... led by a few, have actually sought to do so is, to say the least, shocking.

political alliances of the civil service unions. Their effective lobbying led the Democratic Party to include a pledge in their national platform of 1956 to grant recognition by law of the right of employee organizations to represent their members and participate in the improvement of personnel policies and practices.[166] When the Democrats captured the Whitehouse, formal recognition was not far behind.

C. President Kennedy and the Task Force on Employee-Management Relations

> I have always believed that the right of Federal employees to deal collectively with the Federal departments and agencies in which they are employed should be protected. I should think that a Democratic 87th Congress with Democratic leadership from the White House could deal effectively with a proposal of this nature.[167]

Though the federal government's employee-management relations policies were not a campaign issue in the 1960 election, Presidential candidate John Kennedy, who had supported union recognition legislation while in the Senate, promised it if he were elected. After the elections the federal employee organizations made it clear they expected the "Democratic 87th Congress" to pass a union recognition bill and the "Democratic leadership in the White House" to sign it.[168] Interest in Congress waned when it became known that President Kennedy favored providing for union recognition in the federal service by Executive Order. On June 22, 1961 he issued a memorandum establishing a task force to study the issue and make recommendations.

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[166] Vosloo, *supra* note 162, at 58.
[167] *Id.* at 59, The quote is from a letter from Senator John F. Kennedy to the Illinois State Federation of Post Office Clerks.
[168] Vosloo, *supra* note 162, at 59.

In appointing the task force the President declared his belief that participation of federal employees in the formulation and implementation of employee policies and procedures affecting them contributes to the effective conduct of the public business.[169] The mission of the task force was to review employee-management relations in the federal service and advise the President on how to improve practices which will assure the rights and obligations of employees, employee organizations and the Executive Branch in pursuing the objective of effective labor-management cooperation in the public service.[170] Their paramount consideration in this process was to be the preservation of the public interest and the retention of appropriate management responsibilities.[171]

Because there was not a cohesive governmental policy in effect, federal agencies had proceeded on varying courses of action with some agencies having extensive relations with employee organizations, most having little, and some having nothing. The task force heard repeated testimony that many government officials had interpreted the absence of a positive policy of support for employee-management relations as an excuse for hostile and obstructionist attitudes.[172] Contrary to the belief existing some agencies, the task force reported that federal employee participation could contribute to the effective conduct of the public's business; that the government had had not taken advantage of that means of enlisting the creative energies of government workers in the formulations and implementation of policies that shape the conditions of their work, and; that the time had come to establish a

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[169] President's Task Force on Employee-Management Relations in the Federal Service, Employee-Management Practice in the Federal Service, Staff Report II (1961), *reprinted* in Subcommittee on Postal Personnel and Modernization, 96th Cong., 1st Session. Legisl. Hist. of the Federal Service Labor Management Relations Statute, Title Vii of the CSRA of 1978 (Comm. Print) hereinafter Taskforce, at 1185.
[170] *Id.* at 1178.
[171] *Id.*
[172] *Id.* at 1190.

government-wide policy acknowledging the legitimate role which these organizations should have in the formulation and implementation of federal personnel policies and practices.[173]

The task force noted that everything they proposed as a government wide policy was already established policy at one federal agency or another and they thus fashioned their own program from what had already been tested and proved worthy within the federal government. They did not recommend a uniform government-wide policy, but rather laid down some general guiding principles so each agency could devise its own practices in cooperation with its employees.[174]

In the area of collective bargaining the task force recognized that however much an agency wanted to bargain with its employees on matters of mutual interest, most important matters affecting federal employees were determined by the Congress and not subject to negotiation and thus, while there were real and substantial benefits to be gained for employees through collective negotiations, those benefits were limited. They emphasized that the unions were willing to work within this system even with its limitations just as they accepted limitations on their own activities such as the right to strike.[175] As a further limitation the task force said that any collective bargaining agreement reached should recognize the responsibility of management officials for government activities required a broad management rights clause. The retained management rights included management's rights to direct it's employees; to hire, promote, demote, transfer, assign, and retain employees within the agency on merit principles, to suspend or discharge employees for cause; relieve employees for lack of work or other legitimate reasons; to maintain the efficiency of

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[173] *Id.* at 1179.
[174] *Id.* at 1180.
[175] *Id.* at 1192.

government operations entrusted to them; and determine the methods, means, and personnel by which operations are to be carried out.[176]

The task force recommended that each department and agency of the government should be left to determine its own practices in collective bargaining. They noted that most negotiations would be in the areas of working conditions and personnel and practices, and that major reorganizations or changes in work methods, while not negotiable, involved implementation problems that may be negotiable such as promotion, demotion and training procedures.[177]

The task force considered the special nature of federal employment in every aspect of their investigation and report. Their paramount concern in fashioning recommendations for a government-wide program was that the program would contribute to the public interest. In doing so they determined that, although public employment was not intrinsically different than private employment, the dissimilarities were such that it would be neither desirable nor possible to fashion a federal system of employee-management relations directly upon the system which has grown up in the private economy.[178] They recognized that federal employees do not have the right to strike, and that both the "union" and "closed shop" were inappropriate. The task force also took note of the important differences in the nature of negotiations between employees and management in the private sector and negotiations in the federal government. They recommended that third-party arbitration of negotiation impasses was not appropriate because they feared the developing nature of the employee-management relations made it likely that parties would continually take their problems to a third party for

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[176] Id. at 1199.
[177] Id. at 1201.
[178] Id. at 1191.

settlement rather than attempt to settle their differences themselves through hard, serious negotiations.[179]

Recognizing that bargaining agreements could not impede the government's business the task force also said that any agreement between management and a union must be made with the understanding that a government agency must be free to take any actions necessary to carry out its mission, regardless of any prior commitments. The task force also noted that investigative and intelligence units presented special problems and that the same guidelines that they recommended for other agencies could not be applied to organizations with such functions.[180]

D. Executive Order 10988

President Kennedy praised the task force for their report saying they had devised recommendations for a forward-looking program of employee-management relations keyed to current needs, and he directed an Executive Order be prepared giving effect to their recommendations. In January of 1962 President Kennedy issued Executive Order 10988 which provided the first framework for federal sector labor-management relations. It recognized that participation of employees in the formulation and implementation of personnel policies affecting them could contribute to the effective conduct of public business. The intent of the order was clear in its preamble:

> Employee-management relations within the federal service should be improved by providing employees an opportunity for greater participation in the formulation and

[179] Id. at 1202.
[180] Id. at 1193-1203.

implementation of policies and procedures affecting the conditions of their employment[181]

The Executive Order established the first official government wide pattern for federal employee unions and management. However, heeding the recommendation of the task force the Executive Order excluded the Federal Bureau of Investigation, the Central Intelligence Agency, and other agencies or offices within agencies primarily performing intelligence, investigative, or security functions if the agency head determined the order could not be applied in a manner consistent with national security requirements and considerations. The Executive Order was a milestone in that, for the first time employee organizations were given official recognition by the government and permitted to participate in certain personnel actions, and it provided unions an opportunity to develop in their role and relationship with federal management.[182] Recognizing that the private sector collective bargaining model was inappropriate for the federal sector, the program was intended to formally encourage collective bargaining while at the same time limiting its scope and reserving ultimate authority to the individual agencies that were responsible to the public. The Executive Order required that the head of the agency approve any agreement negotiated. It essentially said that the federal government considered employee-management cooperation to be a good thing, but left it up to individual agencies to determine what was best for them.

Executive Order 10988 was generally warmly received by federal sector unions and greatly increased their growth.[183] As a result there was growth in communication between management and employees and a much greater number of federal employees began to have some say in their working conditions.

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[181] Executive Order 10988, Fed. Reg. January 19, 1962.
[182] J. Joseph Loewenberg, Development of The Federal Labor-Management Relations Program: Executive Order 10988 and Executive Order 11491, 21 Lab. L. J. 73, 75 (1970).
[183] Legislative History, *supra* note 158, at 1163.

E. Executive Order 11491

The impact of Executive Order 10988 was evaluated after eight years. Its impact in terms of collective bargaining agreements was enormous. The number of exclusive bargaining units had gone from twenty-nine units representing 19,000 employees in two agencies to over 3,000 units representing over 1,500,000 employees.[184] Executive Order 10988 produced results beneficial to both agencies and employees by bringing about more democratic management of the workforce and better employee-management communication. The increased communication between employees and management led to improved personnel policies and working conditions which were achieved while maintaining a labor-management atmosphere of reasonable harmony.[185] However as the federal employee unions grew in strength and the number of agreements they negotiated continued to grow, so too did dissatisfaction with the limitations presented by Executive Order 10988.

Though federal managers and agency representatives were somewhat dissatisfied with the system, it was the dissatisfaction of the unions that forced the next change. Most of the large federal unions began a push to achieve union recognition and rights through congressional legislation and in 1966 the national convention of the AFL-CIO adopted a resolution supporting enactment of legislation establishing true collective bargaining rights for federal employees.[186]

In response to the criticism and to the growing concern that unions would again seek congressional action and remove the subject from the domain of the executive, President

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[184] *Id.* at 1164.
[185] *Id.*
[186] Marvin J. Levine & Eugene C. Hagburg, Public Sector Labor Relations 22 (1979).

Lyndon Johnson appointed a committee to review the program and recommend changes. There was no consensus on what reform was needed, but there was general agreement that the size and scope of federal labor-management relations had changed dramatically since 1962 and some change was necessary to meet the different conditions. When President Kennedy enacted it, Executive Order 10988 was tailored to fit the conditions existing at the time. It was purposely done with moderation to help the new program gain acceptance and to minimize the impact of transitioning to a formal, structured labor-management relations system.[187]

The committee held hearings and received testimony from more than fifty agency and union representatives with more then fifty other organizations submitting written statements. Some of the main proposals for change were creation of an independent agency to administer the Executive Order, changes to the scope of agreements, and improvements in negotiation process and dispute settlement.[188] Union leaders wanted a change to the limited scope and process of negotiations that had proven so frustrating. They wanted to expand bargaining to include all matters subject to agency regulations. Appearing before the committee, AFL-CIO leaders took the position that collective bargaining in the federal service had not become the recognized process for determining personnel policies and working conditions and that to achieve genuine collective bargaining it was necessary to widen the scope of collective bargaining and enlarge the authority of local activity management.[189] They also attacked the agencies unfettered right to review and alter agreements, which had been negotiated at lower levels. The unions found this requirement particularly repugnant and felt they were unable to negotiate a contract with agency officials who were unable to consummate a final

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[187] *Id* at 22.
[188] Loewenberg, *supra* note 182, at 75.
[189] Daniel Mathews, *Federal Labor Relations: A Program in Evolution*, 21 Cath. Univ. L. Rev. 512, 535 (1972).

agreement.[190]

Agency representatives were in general agreement that any reform should proceed cautiously and stressed that given the responsibilities of government managers, the safeguards that protected their interest needed to be maintained and that any modification must recognize the primacy of the public interest and limit the scope of bargaining.[191] In its report the committee staff recommended expanding the scope of bargaining only slightly by permitting negotiation of protected measures for employees affected by changes in the workforce.

Other than limited negotiations the main flaw of Executive Order 10988, from the union perspective, was the absence of a method to induce or force agreements. Since its inception unions sought some form of third-party to resolve disputes that arose under the order. Agency administrators negotiated agreements on subjects of their choosing and were also the final authority on any grievances or disputes arising from the agreements they negotiated, except for disputes over what was an appropriate unit. All other agency action was final and the unions had no appeal rights.[192] In contrast to the overwhelming agency authority, the unions had almost no official recourse; they could appeal to Congress, organize off-duty demonstrations; or they could "sub rosa" make things rough for managers in time-honored fashion.[193] They could not strike and, being unable to get any third-party adjudication or mediation, had no adequate substitute for the right to strike.

To remedy the problem the committee's draft report recommended the creation of a three-member Federal Labor Relations Panel authorized to:

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[190] Loewenberg, *supra* note 182 at 76.
[191] Blum & Helburn, *supra* note 161, at 264.
[192] Harriet F. Berger, *The Old Order Giveth Way to the New: A Comparison of Executive Order 10988 with Executive Order 11491*, 21 Lab. L. J. 79, 80 (1970).
[193] Id.

> make definitive interpretations and rulings on any provision of the order, to decide major policy issue, to entertain, at its discretion, appeals from decisions on certain disputed matters and to review and assist in the resolution of negotiation impasses.[194]

It recommended the Panel be given the authority to decide whether matters should be submitted to an expert or panel of experts for binding arbitration. Some agency heads stridently objected to this proposal. Defense Secretary Clifford thought such a program was inappropriate for the Defense Department. Clifford believed the secretary would be deprived of "any voice whatsoever" in disputes between the department and its employees and that he could foresee matters where national security would be involved and he would be powerless to control the situation. He urged President Johnson to reject it because he felt the Defense Department should not lose ultimate decision-making authority over internal disputes and he could not condone the idea that an outside board could govern a department head.[195]

President Johnson's term expired without any action being taken on the committee's recommendations. There was no revision until President Nixon, after further evaluation, issued Executive Order 11491. The major change was the creation of a Federal Labor Relations Council to act as a single, central authority for rulings and interpretations of the labor-management relations program. It was to administer and interpret the Executive Order, hear appeals on arbitration awards, and issue negotiability and unit determinations. Individual agencies would no longer be responsible for observing and enforcing the order internally. It also provided for the creation of a Federal Services Impasses Panel, within the Federal Labor Relations Council, which may be used to resolve impasses when other third-party resolution

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[194] Draft Report of the President's Review Committee on Employee-Management Relations in the Federal Service, April 1968, Appendix B, 56th Annual Report, U.S. DOL, 1968 40-41.
[195] Blum & Helburn, supra note 161, at 273.

failed. Executive Order 11491 slightly broadened the scope of negotiations to allow negotiation over the impact of realignment of work forces and technological change.[196]

Executive Order 11491 was premised on the same concepts as Executive Order 10988 and continued the distinction between private and federal labor-management relations. The order reaffirmed limited negotiability and retained the strong management rights clause of the earlier order, which was believed necessary for carrying out agency functions. It also excluded agency internal security practices from negotiable subjects and made it clear union shops, agency shops and maintenance of membership clauses were forbidden. Like the earlier order, it excluded the FBI and CIA as well as components of other agencies with intelligence, investigative or security functions. The order was a recognition of the maturity and development of labor-management relations in the federal government and attempted to bring federal labor relations in line with practices in the private sector[197]

F. Amendments to Executive Order No. 11491

After the watershed events of Executive Orders 10988 and 11491, the next several years saw tinkering with the program, but no major revisions. After a study by the FLRC recommended revisions, President Nixon issued Executive Order 11616. It mandated every bargaining agreement contain a formal grievance procedure; permitted negotiation over the use of official time for negotiations; and, allowed for automatic withholding of union dues.[198] It did not include any significant change in the scope of bargaining. Executive Order 11838, issued by President Ford in 1975, clarified that the grievance procedure could cover more than

[196] Exec. Order No. 11491, 34 Fed. Reg. 210, (October 31, 1969).
[197] Loewenberg, supra note 182, at 78.
[198] Exec. Order No. 11616, 36 Fed. Reg. 17319 (August 28, 1971).

contract interpretation and allowed the parties to determine its scope. It also made one substantial change to the scope of bargaining by permitting bargaining over agency regulations governing working conditions and personnel policies unless the agency could demonstrate a compelling need to adhere to its regulation.[199]

Federal sector unionism had grown each year while operating under the Executive Orders. Between 1964 and 1968 it grew at annual percentage rates of twenty-five to forty-five percent and leveled off in 1976 with over sixty percent of federal employees represented.[200] Though the number of represented employees continued to grow, the area of bargaining subjects did not. Because monetary items remained off the table, federal departments, agencies and labor organizations representing employees bargained on other issues ranging from the semi-important to the mundane. Negotiated topics included promotion requirements and procedures, overtime, hours of work, tours of duty, shifts, training, salary plans (but not amounts) health and safety, work assignments, scheduling of work, committee memberships incentive awards, dues check-off, grievance and arbitration procedures, parking facilities, use of public address systems, and even the location of desks.[201] The program had its' critics, mostly union leaders who longed for a legislative basis for program so it could not be modified or withdrawn by the president and for the true collective bargaining available in the private sector. A strong criticism, and accurate portrayal, came from a program administrator, W. J. Usery Jr., who observed:

> The truth is that there is precious little real collective bargaining in the federal sector and far too much collective begging. The truth is that unions have generally chosen to use their resources where they will do the most good -- on Capital Hill -- rather than

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[199] Exec. Order No. 11838, 40 Fed. Reg. 5743 (February 7, 1975).
[200] Christine Godsil Cooper & Sharon Bauer, *Federal Sector Labor Relations Reform,* 56 Chi.-Kent L. Rev. 509, 519 (1980).
[201] Robert G. Howlett, *The Duty to Bargain in the Federal Government,* Labor Relations Law in the Public Sector, 115, 119 (Andria S. Knapp ed., 1977).

> fritter them away in the frustrating battle against management rights and the sovereignty of the government. The reason is there is so little true collective bargaining in the federal sector is because there is so little that can be bargained for. Congress preempts the economic issues ... and the truth is the Executive Orders, while well intentioned will one day be replaced by legislation.[202]

V. TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978

A. Background

> Bureaucrats. If you're not one of them, you probably can't stand them. You figure that they're lazy and overpaid, that they arrive at work late and leave early and take long lunch hours. But you can't do anything about it, because it's impossible to fire a bureaucrat.[203]

This was the view many had of the federal service in the 1970's. President Jimmy Carter made civil service reform a central component of his legislative agenda and in March of 1978 sent draft legislation to Congress. In their effort to sell reform to the public, the Carter Administration played to stereotypes of bureaucratic inefficiency and emphasized the punitive aspects of the act. The President himself frequently spoke of the need to remove the deadwood from the bureaucracy.

The President's original legislative proposal did not include a labor-management relations section. Union representatives were unequivocal in stating they would not support the President's plan without it. Appearing before the House Committee considering the proposal, AFL-CIO legislative representative Kenneth Meiklejohn said, "our support ... has not been unconditional, we have made it clear that a reform plan that does not include provision for a legislated system of labor-management relations would not have our

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[202] Address by W.J. Usery, Jr., to the Collective Bargaining Symposium for Labor Relations Executives, Warrenton, VA, July 8, 1974, taken from Michael R. McMillon *Collective Bargaining in the Federal Sector*, 127 Mil. L. Rev. 169, 188 (1990).

[203] National Journal, "*Bureaucrats Under Fire*," September 30, 1978, at 1540.

approval ... civil service reform cannot be achieved without it ... this has been a subject of intensive discussion among our unions and the administration. Before the same committee the executive director of the employee department of the AFL-CIO, John McCart, stated, "our paramount concern is that there be a statutory basis for the right of federal employees to bargain collectively as workers in the private sector have had for forty-three years ... it is an essential element of any civil service reform effort."[204]

The President sent a labor-management reform bill to the Congress two months later, as an amendment to the original bill, in implicit exchange for support of the legislation as a whole by federal employee unions.[205] Representative Morris Udall, who served as the floor manager in the House for the legislation and whose leadership was essential in getting the bill passed, noted the bill was going nowhere without a labor-management provision stating that if there was not a Title VII there would be no bill.[206] Thus the legislation longed for by federal employees and their unions came about as part of legislation intended to make it easier to fire government employees.

Title VII, as submitted to Congress by President Carter, did little more than codify the program as it existed at the time under the Executive Orders. It proposed creation of the Federal Labor Relations Authority with three fulltime presidential appointees and a general counsel to handle unfair labor practice charges, but offered nothing in the way of expanded bargaining. It received scant attention in the Senate. One official said, Title VII was referred to by the Senate Staff as the 'Dark Continent' because nobody understood what was in it.

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[204] A Bill to Reform the Civil Service Laws: Hearings on H.R. 11280 Before the House Comm. on Post Office and Civil Service, 95th Cong. 95-65, 711 (1978), hereinafter, Hearings.
[205] Patricia W. Ingraham & Carolyn Ban, Civil Service Reform: Legislating Bureaucratic Change 1-10, in Legislating Bureaucratic Change, The Civil Service Reform Act of 1978, (Patricia Graham and Carolyn Ban eds., State Univ. of New York Press 1984).
[206] 24 Cong. Rec. 28798 (1978).

Apparently they didn't care to learn either because it was passed, in near original form, by an eighty seven to one vote, with no debate about its provisions on the Senate Floor. [207]

Things were much different in the House. After months of hearings and consideration of amendments which would have done everything from provide full private sector type bargaining to removing Title VII all together, the Committee on Post Office and Civil Service substituted an entirely new bill. Having won the fight to get a statutory basis for bargaining the unions tried to expand its scope and coverage. Testifying before the Committee, they argued meaningful changes could not be accomplished simply by reshaping management's excessive control over all aspects of federal employment, and that if any re-organizational effort was to be effected it must include expanded collective bargaining as a central factor.[208] Exclusion of agencies in the interests of national security, an established practice under the Executive Orders, was also questioned. In a statement applicable to our current situation that could have come from the Homeland Security Department debate, AFGE President Kenneth Blaylock testified:

> We resent to the core any implication that, somehow, free democratic labor unions pose a security threat to the United States. We recognize that there are employees directly engaged in certain intelligence, investigative, or security functions in the FBI, CIA and NSA and in internal audit or investigative functions in other agencies, who perhaps should be excluded from union representation. We do not, believe, however, that there is any need to include typists, secretaries, clerks, carpenters, plumbers, and many other categories of personnel who may be employed in such agencies from the benefits of union representation.[209]

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[207] Donald F. Parker, Susan J. Schurman & B. Ruth Montgomery, Labor-Management Relations Under CSRA: Provisions and Effects 163, in Ingraham et al. *supra* note 205, the quote is from Jule M. Sugarman, Deputy Director, OPM.

[208] Hearings, *supra* note 204, at 159 (testimony of Vincent L. Connery, National President of the National Treasury Employees Union).

[209] Hearings, *supra* note 204, at 719 (testimony of Kenneth Blaylock, President of the American Federation of Government Employees).

The Committee attempted to strike a balance between the public interest and the demands of federal employees who wished to have a greater voice in the employment policies applicable to them. Noting that postal workers and Tennessee Valley Authority employees enjoyed collective bargaining over all aspects of their employment, they recommended a new program to permit expanded bargaining on most issues, except for pay and fringe benefits which would continue to be set by Congress. They retained the prohibition on strikes and agency shops. They also included a statement on management rights.

A strong minority in the Committee favored granting full collective bargaining. They disagreed that an increase in collective bargaining would lead to a decrease in the efficiency of the federal service arguing that effective unions and bargaining could improve efficiency. They also lamented the hysterical atmosphere which clouds the issue of collective bargaining for federal employees. In a criticism that is just as poignant today, Representative Schroeder questioned the inconsistent practice of denying federal employees the same rights which contractors who perform government work enjoy, observing:

> It is not often politic for officers in the executive and legislative branches to mention it, but there are millions of workers in the private sector (ranging from $200 per hour consultants to $3 per hour custodians) who, but for the federal government contracting work out, would be federal employees. These private employees are, of course, in jobs which have and are being created to perform work the federal government needs performed without 'creating more bureaucrats.' Nobody talks about the horrible things which would happen if such people were allowed to participate in political activities or engage in full collective bargaining. They already have such opportunities. I have yet to see anyone propose that such opportunities be abolished. Things have not been so horrible. The executive branch, which claims it needs so much management 'flexibility' in labor-management when it comes to its own employees, is perfectly happy day in and day out not only to contract with private companies which don't have such management 'flexibility' and face situations in which employees in such companies have opportunities for all sorts of labor actions. The executive branch also enforces through its various agencies this same so called labor-management 'inflexibility.' So much for the horrors of collective bargaining.[210]

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[210] H.R. Rep. No. 95-1403, at 383 (1978).

On the House floor, two substitute bills were submitted that would have considerably broadened the scope of collective bargaining to include negotiating over wages, provided for the right to strike, and allowed an agency shop. They were voted down in the end and a compromise was reached in which unions gained statutory authority for labor relations, but in which management retained considerable flexibility in dealing with employee unions.

After differences between the Senate and House versions of the legislation were worked out President Carter signed the Civil Service Reform Act into law on October 13 1978, and it went into effect on February 9, 1979.[211] Although the law did not go as far as some hoped and provide private sector type bargaining rights it did move federal sector labor relation towards the private sector model. The biggest structural change was creation of the Federal Labor Relations Authority (Authority), modeled after the National Labor Relations Board. The Authority, a three-member bipartisan panel whose members may only be removed for cause, was given substantial powers including; determining appropriate bargaining units, resolving negotiability disputes arising from the interpretation of the provisions of the law relating to collective bargaining, and; determining unfair labor practices and requiring agencies or unions to discontinue violations and take appropriate remedial actions.[212] It also created a General Counsel of the Authority to investigate and prosecute unfair labor practices before the Authority. Another important and related aspect of the reform is, because it was statutory and not based on an Executive Order, employee rights were enforceable in court for the first time just as in the private sector. The Authority can seek enforcement orders in Federal Court and any aggrieved party may seek judicial review.

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[211] § 5 U.S.C. §§7107-7135 (1978).
[212] *See id.* § 7105.

B. Statutory Structure

1. National Security Provisions

With the enactment of the CSRA of 1978 federal employees at last had a statutory basis for bargaining. The preamble to Title VII of the Act, the Federal Service Labor-Management Service Relations Statute (Statute), stated the Congress' belief that statutory protection of the right of public employees to collectively bargain safeguards the public interest and contributes to the effective conduct of public business and, therefore, collective bargaining in the federal service was in the public interest.[213] Mindful of the historical concerns of public sector bargaining they stated their purpose was to grant rights to federal employees while retaining procedures designed to meet the special requirements and needs of the government.[214] Preeminent among these were the retention by the president of the powers necessary to perform his duty of protecting the national security, and the power of executive branch agencies to perform their missions unhampered by any constraints imposed as a result of bargaining. These provisions ensure that collective bargaining by federal employee unions, though capable of frustrating and annoying management with what are often petty concerns, could not undermine national security.

Though the Statute guarantees the right to collective bargaining is no longer at the whim of the president, the Statute allows the president to exempt any agency with an intelligence, investigative or security function if he determines application of the statue to the

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[213] 5. U.S.C. §7101.
[214] *Id.*

agency is inconsistent with national security.[215] Every President from Jimmy Carter to George Bush has exercised this authority and as an executive action it is presumed legitimate in the absence of contrary evidence. In AFGE v. Ronald Reagan[216] the union filed an action challenging the legality of the executive order that excluded certain subdivisions of the United States Marshals Service from collective bargaining pursuant to § 7103(b)(1) of the Statute. Their challenge was that the order was illegal because the President failed to expressly recite his determinations of fact that justified its issuance. The court determined that the Statute does not require or even suggest the President make any specific findings and reproduce them in his order. In the absence of any alleged irregularity in the President's fact-finding process or activity, the court presumed executive regularity. Rejecting the AFGE challenge the court cited Supreme Court precedent:

> When the President exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law. Every public official is presumed to act in obedience to his duty ... this presumption ought to be favorably applied to the chief magistrate of the Union.[217]

The authority of the president to issue executive orders excluding agencies or subdivisions from the Statute has never been successfully challenged. The fact no president has ever used this power to remove an entire agency with a national security function, e.g. the DoD, the various National Guards, and the Coast Guard, even in the wake of September 11th, is evidence of the fact their collective bargaining agreements do not impede performance of their missions.

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[215] 5 U.S.C. §7103 (b)(1) provides the President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that (a) the agency or subdivision has a as a primary function intelligence, counterintelligence, investigative, or national security work, and (B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

[216] AFGE v. Ronald Reagan, 870 F.2d 723 (U.S. App. D.C. 1989).

[217] Id at 727, citing Martin v. Mott 6 L. Ed. 537 (1827).

The Statute also prohibits the Authority, which is charged with determining appropriate bargaining units, from certifying as appropriate any unit which includes employees engaged in intelligence, counterintelligence, or other work directly effecting national security.[218] In Department of Energy, Oak Ridge Operations, Oak Ridge Tenn., (Oak Ridge)[219] the Authority issued its first determination of what national security work is. After noting that "security work," "directly affects," and "national security" were not defined by the Statute, the Authority did not attempt to discern the congressional intent behind those terms. They simply supplied their standard definition from the Webster's Dictionary.[220] They noted that Congress determined bargaining to be in the public interest, and that exclusion from a unit deprives employees of the opportunity to determine whether or not they wish to be represented and engage in bargaining. They therefore gave the language a narrow reading holding:

> The term national security must be interpreted to include only those sensitive activities of the government that are directly related to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the government in domestic and foreign affairs, against or from espionage, sabotage, subversion foreign aggression, and any other illegal acts which adversely affect the national defense.[221]

The decision in Oak Ridge has stood and was expanded in United States Department of Justice (DOJ).[222] In DOJ the Authority determined an employee is involved in "security work" if the required tasks, duties, functions, or activities of the employee's position include:

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[218] 5. U.S.C. § 7112(b)(1): a unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it included (6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly effects national security; or (7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly effect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

[219] 4 FLRA 644 (1980).

[220] Id. at 645.

[221] Id. at 655.

[222] 52 FLRA 1093 (1997).

(1) the designing, analyzing, or monitoring of security systems or procedures; or (2) the regular use of, or access to, classified information. Any employee engaged in security work, as defined, which directly affects national security may not be included in a bargaining unit.

The Oak Ridge and DOJ decisions have adequately protected the right of agencies to prevent inclusion of individuals involved in work affecting national security from bargaining units. There is also an indication that, due in large part to September 11th, the Authority is prepared to expand the definition further. In Social Security Administration (SSA) and AFGE the Authority was asked to rule on the decision of a Regional Director (RD) on inclusion of certain positions in a bargaining unit. The positions were; physical security specialists, whose duties were to conduct site surveys of SSA offices to assess their security systems and recommend improvements as well as grant access to SSA facilities, and; electronic technicians, who participate in the design, installation and implementation of security measures at SSA facilities. The RD determined that though the duties could be construed as security work they did not have a straight bearing or unbroken connection that materially altered national security.

In its appeal to the Authority, the Agency stated the RD failed to thoroughly consider the national security implications of the work. They argued the protection of blank social security cards and numbers is directly related to national security because failure to protect them could facilitate a terrorist attack on the United States, and that it was also conceivable a computer expert with unauthorized access to SSA field facilities could tap into the information stored there and share it with a terrorist organization.[223] The Agency stated:

> There are few cases on the issue of national security, and none that directly relate to the preservation of the economic and productive strength of the United States. Furthermore, there are no precedents that address the increase[d] importance of

[223] 58 FLRA 170 (2002).

> security in light of recent terrorist attacks on the United States. The entire concept of security in the federal government has been changed by the bombing of the federal building in Oklahoma City in 1995 and the attacks on the World Trade Center and the Pentagon on September 11, 2001. The Authority has issued no decisions reflecting on those events.[224]

Evaluating the appeal, the Authority noted that Oak Ridge used a standard, non-legal, definition of "directly effects" to only include those positions whose work directly involves national security, but that there is an absence of precedent for positions involving security work directly related to the protection and preservation of the economic and productive strength of the United States. It appears the Authority is open to broadening their definition of directly related to more of a proximate cause analysis. Citing the absence of precedent they asked the parties to file briefs addressing the question: if the security work performed merely involves national security, does it directly effect national security? Citing the interest this issue will have in the federal sector labor-management relations community in general they published a Federal Register Notice inviting comments. If they fail to persuade the Authority the SSA is likely to prevail on an appeal given the traditional deference shown to executive branch agencies in making national security determinations.[225]

The president's ability to exclude agencies from the Statute, coupled with the power of the Authority to limit certain positions from bargaining units, adequately protects the power of the executive branch to prevent collective bargaining among those directly involved in national security functions. What about those units that are authorized to engage in bargaining? Could they have an effect? The limitations on bargaining contained in the Statute to preserve the capability of agencies to perform their missions and the interpretation

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[224] *Id.* at 173.

[225] *See, e.g.,* Navy vs. Egan, 484 U.S. 518 (1988) where the Court, in determining the Merit Systems Protection Board lacked authority to review denial of a security clearance, noted that the President is constitutionally invested with the power to make national security determinations and that courts should show the utmost deference to presidential responsibilities.

and enforcement of those provisions by the Authority delimit the power federal employee unions have. An analysis of them makes it clear that collective bargaining, as allowed, could not affect national security.

2. Collective Bargaining Provisions

The Statute strengthened the right of unions to bargain over conditions of employment and mandated the use of binding arbitration for employee and union grievances. It also created a system for independent resolution of bargaining impasses and mandated all collective bargaining agreements contain provisions for binding arbitration.

To evaluate the impact collective bargaining could have on agency operations and how it could potentially impact national security it is necessary to analyze the system under which the parties operate. The primary concerns are the obligation to bargain and the remedies that the Authority can order in an unfair labor practice proceeding, or an independent arbitrator could order under a negotiated grievance procedure.

The Statute obligates agencies to negotiate with recognized labor organizations over conditions of employment and there are four instances that create an obligation to engage in such collective bargaining. The first two, referred to as "term bargaining" are the obligation to bargain an initial collective bargaining agreement whenever a union is accorded exclusive recognition, and the obligation to negotiate a new collective bargaining agreement upon expiration. The third, "mid-term bargaining" refers to the obligation to bargain over matters not covered by an existing collective bargaining agreement whenever the exclusive representative requests it. The final instance, and one most important to this analysis, is the

obligation of the agency to engage in bargaining whenever management proposes to change conditions of employment.[226]

Though bargaining is mandatory, the Statute continued the many restrictions on scope. Agencies may not bargaining over proposals which are inconsistent with statutes or government wide regulations, nor over any matter inconsistent with an agency regulation for which the Authority has determined there is a compelling need.[227] The Statute also contains a very broad management rights provision.[228] Though agencies are not required to bargain over the exercise of their management rights, they are required to bargain over appropriate arrangements for employees adversely affected by the exercise of those rights and the procedures that will be used. This is known as impact and implementation or "I and I bargaining."

Whenever management plans to make a change in the conditions of employment that affects employees of a recognized bargaining unit it must give the exclusive representative notice of the proposal and an opportunity to bargain.[229] When the union requests bargaining it must present negotiable proposals. If the subject is nonnegotiable the parties must still bargain over I and I if the change has more than a de minimis impact on unit employees.[230] In determining whether the impact is more than de minimis, the Authority places principal emphasis on such general areas of consideration as the nature and extent of the effect, or

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[226] 5 U.S.C. §7101-7114.
[227] *See id.* § 7117.
[228] 5 U.S.C. §7106 *Management Rights* - nothing in this chapter shall affect the authority of any management official of any agency (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and (2) in accordance with applicable laws (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take disciplinary action against such employees; (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted.
[229] March Air Force Base and American Federation of Government Employees, AFL-CIO Local 1953, 13 F.L.R.A. 255 (1983).
[230] Department of Health and Human Services, Social Security Administration, 24 F.L.R.A. 403 (1986).

reasonably foreseeable effect, of the change in conditions of employment on bargaining unit employees, and takes equitable considerations into account when balancing the interests involved.[231] The parties are expected to bargain to an agreement or impasse and the agency is expected to maintain the status quo until agreement is reached. If the parties reach impasse they may seek the services of the Federal Mediation and Conciliation Service (FMCS), and if they are still unable to resolve the impasse either party can appeal to the Federal Services Impasses Panel.[232]

An agency commits an unfair labor practice if it violates its bargaining obligations and the Statute vests the Authority with wide discretion to fashion appropriate remedies for violations.[233] Typical remedies include a cease and deist order, a posting, a bargaining order, and a return to the status quo ante. Whether a status quo ante is ordered depends upon whether the bargaining involves the exercise of a management right. If a matter has not been reserved to management and is substantively negotiable the Authority has held that, absent special circumstance, it will order a status quo ante when management changes a negotiable condition of employment without fulfilling its obligation to bargain on the change. The Authority has held that a status quo ante effectuates the purposes and policies of the Statue and ensures the obligation to bargaining is not rendered meaningless.[234]

If the subject of the negotiations is not substantively negotiable, the Authority determines the appropriateness of a status quo ante remedy on a case-by-case basis. Status quo remedies may be issued in refusal to bargain cases even when the agency's decision is not

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[231] Id.

[232] 5 U.S.C. § 7119

[233] 5 U.S.C. § 7105 (g)(3) provides (g) In order to carry out its functions under this chapter, the Authority may -- (3) require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out its policies of this chapter.

[234] See e.g., Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 35 FLRA 153, 156 (1990); United States Army Adjutant General, Publication Center, St. Louis, Missouri and American Federation of Government Employees, AFL-CIO, Local 2761, 35 F.L.R.A. 631, 631-635 (1990).

itself negotiable. When management exercises a reserved right under §7106 without fulfilling its duty to bargain concerning the I and I procedures it will use and regarding appropriate arrangement for bargaining unit employees adversely affected, the Authority occasionally requires a return to the status quo ante. Cognizant of the intrusion on a management right the Authority balances the nature and circumstances of the violation against the degree of disruption in governmental operations, which would be caused by such a remedy.

The Authority specifically considers (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such change or action; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agencies operations.[235]

The Statute also contains provisions relating to national consultation rights. A union representing a substantial number of employees of an agency, as determined by the Authority, is granted national consultation rights with the agency with respect to any government -wide rules or regulations issued by the agency effecting any substantive change in any condition of employment. The union has a right to advance notice and a reasonable time in which to present its views and recommendations regarding the proposed change. The agency must

[235] Federal Correctional Institution and American Federation of Government Employees, Local 2052, AFL-CIO 8 F.L.R.A. 604, 606 (1982).

consider any views and recommendations submitted and provide a written statement of its reasons for taking final action.[236] The obligation to engage in national consultation is not limited by the nature of the change, whether it is substantively negotiable, or if the change is only de minimis. However, the obligation is only to consult; the agency is not required to bargain at the national level or adopt any of the union's proposals. Once they have completed national consultation the agency is still obligated to engage in bargaining at lower levels of recognition. Remedies for violation of a union's national consultation rights may also include a return to the status quo ante.[237]

Because the agency does not have to follow the proposals made by the union during national consultation it is not possible for national consultation rights to materially affect the ability of an agency to conduct its operations. Therefore it is also not possible for national consultation rights to affect national security. Although an order to return to the status quo ante is possible if an agency does not meet its obligations, the Authority has recognized that an agency can act without engaging in consultations in cases of emergency or when other compelling reason for taking immediate action exist.[238]

3. Emergency Exception

Though there is scarce case law in the area, the Statute explicitly recognizes the right of an agency to take whatever action may be necessary to carry out the agency mission during an emergency.[239] If an agency makes a showing that it had to make a change without

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[236] 5 U.S.C. § 7113 (a)(1), (b)(1), (2).
[237] National Guard Bureau and National Association of Government Employees 18 F.L.R.A. 475 (1985).
[238] *Id.*
[239] 5 U.S.C. §7106 (a)(2)(D).

bargaining it first, the Authority has held it is acceptable as long as they engage in post-implementation bargaining as soon as conditions allow. When applying this provision the Authority has not accepted bare assertions from agencies that they could not bargain; the Authority has held their feet to the fire and required evidence.

In *56th Medical Group MacDill Air Force Base and AFGE Local 547* (MacDill)[240] the Agency held that the military operation, Desert Storm, did not in and of itself constitute an emergency and the agency needed to demonstrate how that operation prevented bargaining. In *MacDill*, the agency unilaterally changed its employee leave policy that had been in effect for twenty-three years. Employees, who routinely forecast their leave for the entire year in January were told scheduled leave would be cancelled and no new leave approved. When their union representative complained to the installation commander he was told, "due to Desert Shield ... leave would have to be denied because of the deployment of troops to Saudi Arabia."[241] After presenting a formal, written demand for bargaining the union received a reply from the commander stating "It is my prerogative as commander to regulate working schedules as I see fit in the best interests of my organization ... the policy will stand as implemented."[242] Evaluating the Agency claim that the military operation compelled its action, the Authority noted the Agency had never before failed to negotiate changes in leave procedures due to emergencies such as the Cuban Missile Crisis which involved much less notice and advanced build-up that Desert Shield.[243]

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[240] 43 F.L.R.A. 1565 (1992).
[241] *Id.* at 1573.
[242] MacDill, *supra* note 240, at 1574.
[243] MacDill, *supra* note 240, at 1580.

Relying in part on their previous decision in *U.S. Department of the Army, Lexington Blue Grass Army Depot, Lexington Kentucky*[244] the Authority rejected the Agency's contention that Desert Shield constituted an emergency situation. In Lexington, the Agency argued that it could not comply with a status quo ante order that was issued to remedy the Agency's previous failure to bargain over a reduction in force. The Agency argued that implementing the status quo would place their employees in positions not necessary to support Agency operations and would seriously disrupt their support of Operation Desert Shield. The Authority noted the Agency did not provide any evidence in its supporting documents to demonstrate that complying with the order would adversely effect their operation, and clarified that to avoid a bargaining obligation an agency must do more than make a bare claim that certain actions cannot be taken because of a military operation.[245] Reaffirming its position, the Authority held in *MacDill*:

> The General Counsel notes and I agree that if a "true" National emergency existed, the President under section 7103(b)(1)(B) of the statute [5 U.S.C. § 7103 (b)(1)(b)] presumably could have issued an Executive Order suspending the Respondent's Statutory obligations. The absence of any such order certainly militates against any finding that Respondent could unilaterally suspend Statutory rights.[246]

The Authority ruled the absence of such an order militated against a finding the Agency could unilaterally suspend statutory rights and that the agency failed to provide any evidence that there was a shortage of personnel which created an "emergency" for the agency that prevented it from bargaining over the new policy.

Cases such as *MacDill* and *Lexington* are typical of those which opponents of bargaining use to demonstrate the deleterious affect it can have on agency operations. Without evaluating the underlying facts the cases can be presented as situations where, in a

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[244] 39 F.L.R.A. 1472 (1991).
[245] *Id.* at 1480.
[246] MacDill, supra note 240, at 1578.

time of war, unions and not commanders dictated how personnel would be deployed and agency operations conducted. Those so disposed could spin the *MacDill* case as one in which unions allowed their members vacation plans to interfere with the nation's war-fighting operation. The facts show that these cases did not present true emergencies requiring immediate action, but rather instances where agencies claimed emergency circumstances to evade their statutory obligations.

In situations involving true emergencies the Authority will allow an agency to change a working condition without bargaining. In *U.S. Customs Service and National Treasury Employees Union* (Customs)[247] the Authority held that emergency conditions excused a unilateral change. In 1985, Customs, which was under increasing congressional pressure to raise its seizure levels in support of the war on drugs, received certain intelligence information indicating a large quantity of drugs was being smuggled into the United States through the San Ysidro, California Port of Entry by means of secret compartments hidden in fully loaded trucks. They devised a secret special operation designed to interdict the shipments. The plan was to inspect empty trucks returning to Mexico for purposes of discovering secret compartments that could be utilized to smuggle drugs. If such a department was discovered the truck would be placed in a database for later identification if it returned fully loaded. According to agency total secrecy of the operation was necessary because the San Ysidro Port was under constant surveillance by smugglers who could easily defeat the plan by diverting trucks to other points of entry.[248] To effectuate the plan, the Agency would have to stop trucks on the American side of the border and it would be necessary to utilize a parking lot that was being used by employees. The plan was to use the lot on an irregular basis to remove

[247] 29 FLRA 307 (1987).
[248] *Id.* at 319-320.

predictability and confuse the smugglers. On November 7, 1985 the Port Director informed the president of the local NTEU that due to a special operation the unit employees would be prohibited from parking in the lot effective November 21, 1985. The agency then implemented the change without engaging in bargaining.

The Agency defended its action on the ground that it could not give timely notice due to its concerns with maintaining secrecy and the element of surprise. The Agency argued that it would compromise their operation. In affirming the findings of the Administrative Law Judge, the Authority found that failure to give timely notice to the union and bargain was excused because it fell within emergency provision of § 7106(a)(1)(d) which allowed the agency to implement the change and bargain with the union on a post-implementation basis. The Authority affirmed that Congressional pressure and the intelligence information the Agency possessed concerning drug shipments created an emergency situation that necessitated immediate secret action, and that the operations might have been compromised if the Agency had given the union timely notice and the opportunity to bargain over the decision. The Authority also affirmed that the emergency allowed the Agency to detail Customs Inspectors, who usually handle routine passenger and cargo processing, to the Contraband Enforcement Team, whose specialty is the interdiction of drugs and contraband and to temporarily reassign other employees to support the operation.[249]

The facts in *Customs* parallel some of the collective bargaining horror stories heard in the homeland security debate and could be spun as unions valuing preserving their members parking spots more than aiding in the drug war. But the *Customs* decision demonstrates that when a true "emergency" requires an agency act without notifying the union or bargaining it

[249] Customs, supra note 247, at 320, The Authority did affirm that the Agency violated its bargaining obligation when it failed to bargain the substance of its decision to ban parking in the lot on a permanent basis after the special operation was over.

will be excused, as long as the agency fulfills its obligation to engage in post-implementation bargaining. The emergency exception provides agencies the flexibility necessary to carry out their missions while complying with their statutory obligations.

4. Unilateral Change

The *Customs* case involved compelling facts that created a true emergency and allowed an agency to unilaterally change working conditions, keep a union in the dark about what they were doing, and flat out refuse to bargain the change. What about situations where the agency is not dealing with an emergency, but simply needs to implement a change expeditiously and failure to implement the change would affect their ability to perform their mission? The Authority acknowledges that there are times when an agency has an acute need to implement a change before negotiations can be completed and the maintenance of the status quo during negotiations is not consistent with the necessary functioning of the agency.

In *Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Laredo*[250] the Authority adopted an Administrative Law Judge's findings that the Border Patrol did not need to bargain a decision to change the shifts and schedules of its employees at the Laredo Station. The Authority held that the shift and schedule changes were required consistent with the necessary functioning of the agency. They relied on the fact that the Border Patrol is a law enforcement agency entrusted with protecting our national border from illegal aliens and the Border Patrol thought the change was necessary to permit the Laredo station to effectively police the border and perform its duties most effectively. They held that the decision of the Border Patrol officials was

[250] 29 F.L.R.A. 90 (1986).

premised on their perception, based on the best intelligence available to them, that the changes would stop the maximum number of illegal aliens. The changes were therefore necessary to effectively police the border and allow the Border Patrol to perform its duties effectively and did not need to be bargained over before implementation.[251]

This exception derives from a line of cases dealing with the duty to maintain the status quo while a bargaining impasse is before the Federal Services Impasses Panel. The principle applied in those cases is that the status quo must be maintained to the maximum extent possible, i.e., to the extent consistent with the necessary functioning of the agency. The Authority has held that when an agency chooses to take this course of action and alter the status quo before the completion of bargaining it must provide affirmative support for the assertion that the action taken was consistent with the necessary functioning of the agency if its actions are contested in an unfair labor practice hearing.[252] The Authority has also held that the standard "consistent with the necessary functioning of the agency," may be accurately characterized as, "necessary for the agency to perform its mission."

C. Otis Air National Guard Base Incident

The events of September 11, 2001 were the reason for creation of both the TSA and Homeland Security Department, and brought national security issues to the forefront of the debate about collective bargaining rights. It is worthwhile to examine how, if at all, bargaining obligations hampered an agency tasked with responding to the attacks. The Otis

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[251] *Id* at 115, Though the Border Patrol was privileged under § 7106 (b)(1) of the Statute, to refuse to bargain about the institution of the schedule changes it was obligated, under § 7106(b)(2) and (3), to bargain over the impact and implementation of the changes.

[252] Development, Kansas City Region, Kansas City, Missouri, 23 F.L.R.A. 435, 437 (1986).

National Air Guard Base (Otis ANGB), in Massachusetts routinely provides air defenses for the northeast air defense sector of the United States. On the morning of September 11, Otis ANGB scrambled F-15s to intercept the hijacked planes that subsequently crashed into the World Trade Center. From that morning forward Otis ANGB provided continuous air patrols over New York City and Boston and supported other post September 11 homeland security missions.

The National Association of Government Employees (NAGE) represents the civilian employees of Otis ANGB, e.g., the mechanics, electricians, and ground crew members who are primarily responsible for keeping the base up and running. Prior to September 11th, the NAGE members were operating under an alternative work schedule (AWS), which permitted them to work four ten-hour days per week. On September 17, 2001 the Otis ANGB commander notified the NAGE that he was immediately suspending the AWS pursuant to §7106(a)(2)(D). The union responded two days later requesting negotiations over procedures and appropriate arrangements, i.e., I and I bargaining. On September 20, 2001 an Otis ANGB representative responded, "when emergency conditions allow, management will bargain the procedures which management officials will observe in exercising emergency authority as well as appropriate arrangements for employees adversely affected."[253] On September 5, 2001 the NAGE filed an unfair labor practice charge with the Authority alleging that Otis ANGB was failing to meet its bargaining obligations and requesting a bargaining order. On December 20, 2001 the NAGE was notified that Otis ANGB was then in a position to bargain

[253] Department of the Air Force, Otis Air National Guard Base, Case No. BN-CA-01-0763, Decision of the Regional Director, October 2, 2002.

and the NAGE replied offering no new proposed schedule, but requesting immediate re-implementation of the AWS.[254]

After conducting an investigation into the allegations the Regional Director issued his findings on October 2, 2002. He ruled that given the immediacy of the responsibilities on Otis ANGB after September 11th the evidence supported a finding that an emergency condition existed within the meaning of §7106(a)(2)(D). He found the situation was such as to allow Otis ANGB to immediately implement its decision to suspend AWS without providing NAGE a bargaining order prior to implementation. He also issued a complaint alleging Otis ANGB violated the statute by refusing to engage in post-implementation bargaining.

The Authority agreed to settle the portion of the complaint alleging failure to timely conduct post-implementation bargaining due to the Otis ANGB commander's willingness to bargain once conditions permitted it. The final settlement agreement, which involved no posting or other remedy, stated the Otis ANGB commander acted in accordance with §7106(a)(2)(D) when he suspended the AWS in light of the national emergency presented by the terrorist attacks and the mission to provide air patrols to defend the United States from further attacks.[255]

The unilateral action doctrine allows agencies to take immediate, unilateral action if it is necessary. An agency with such a need can avoid a ULP by advising the union of its situation and offering post-implementation bargaining. If practical, any negotiated agreement could be applied retroactively. Together with the emergency exception, the unilateral action

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[254] *Id.*

[255] Department of the Air Force, Otis Air National Guard Base, Case No. BN-CA-010763, Settlement Agreement, September 9, 2002.

doctrine provides sufficient agency flexibility. Any agency facing an emergency or compelling need to act immediately can refuse to bargain and implement a change, and an agency that needs to make a change to effectively perform its mission will not be prevented from acting due to being bogged down in endless negotiations.

If the obligation to bargain does not prevent agencies from carrying out their missions why is it that some argue it could affect national security? It is telling that during the homeland security debate even the most virulent opponents of collective bargaining could not assert even one instance where an agency actually was prevented from taking an action that was necessary to carry out its mission. As discussed above, the Statute, as interpreted by the Authority, provides adequate safeguards to prevent that. The reason for the opposition lies not in the situations involving agencies faced with true emergencies involving national security, but rather the poor labor-management relations that have plagued the federal system.

VI. LABOR-MANAGEMENT RELATIONS UNDER THE FSLMRS

Although some level of animosity is to be expected in any labor-management system, the federal system has been characterized by poor relations, a lack of progress, and abundant time, money, and human resources wasted on meaningless squabbling. The limitations included in the Statute meant the right of federal employees to have a voice in the decisions effecting their working lives would always be subordinate to the government's right to performance. Its passage was more a commitment to the process of collective bargaining than the substance, and the bargaining structure it erected has functioned more as a symbol of

frustration than as a facilitating device.[256] After a few years operating under the system one union leader observed, "I just tell our people don't waste your damn time on collective bargaining ... it is a useless exercise for our people ... the real bargaining in the federal government is on Capital Hill.[257]

With the bread and butter issues remaining off the table unions made lobbying the main focus of their efforts because that is where they can achieve the most for their members. At the local bargaining level union leaders are forced to search for issues that will enhance their standing with the union membership. The limited scope of bargaining denies the parties the opportunity to solve their most fundamental disagreements together and the ability to give and take does not develop. It infantilizes the parties involved and turns negotiating into a form of guerilla warfare where the unions often press any issues that can be negotiated regardless of their merit.[258] A former union leader accurately portrayed the mindset and behavior fostered by the system observing:

> We loved the adversarial game. We each loved the game so much because every new employee right was, of necessity, created at the expense of the exercise of a management right. It was a zero sum game, a kill or be killed game. It is no wonder we fought so hard. We could not expand the size of the rights pie to facilitate settlement of disputes. Increasing the size of the pie is a traditional method of solving difficult problems, but the narrow scope of bargaining prohibited any pie expansion, so we continued to fight over the scraps available.[259]

In passing the Statute, Congress asserted that labor organizations and collective bargaining in the civil service were in the public interest, and they identified several goals the program was intended to accomplish. The goals included effective and efficient government,

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[256] George T. Sulzner, *Federal Labor-Management Relations: The Reagan Impact*, 15 J. Collective Negotiations, 201, 202 (1986).
[257] *Id*, at 209, quoting AFGE President Kenneth Blaylock in 1995.
[258] Charles J. Coleman, *Federal Sector Labor Relations: A Reevaluation of the Policies*, 16 J. Collective Negotiations. 37, 44 (1987).
[259] Robert Tobias, Address at the FLRA 20th Anniversary Luncheon (June 14, 1999).

amicable settlement of disputes, and employee participation through labor organizations in decisions that affect their working lives.[260]

In 1991 the United States General Accounting Office (GAO) reviewed the program to determine if those objectives had been met, how well the program was working, and if changes were needed to make it operate more effectively and efficiently.[261] The vast majority of the experts GAO interviewed said the program was not working well. More than three-fourths of the experts they surveyed said that federal collective bargaining has not accomplished the objectives of the statute. They felt the bargaining processes were too legalistic and adversarial and too often led to litigation over procedural matters and minor disputes.[262] The report concluded that the problems in the federal labor-management relations system were so widespread and systemic that technical revisions would not provide a workable solution and they recommended Congress develop a proposal for comprehensive reform.

Collective bargaining was singled out as the biggest disappointment. Predictably, union respondents blamed much of the problem on the limited scope of bargaining and overwhelmingly (ninety-six percent) favored expanding it. But nearly all of the union and agency representatives interviewed (twenty-nine out of thirty) felt the system was too adversarial and the parties tended to resort to litigation rather than try to resolve differences at the bargaining table. The comments of the agency representatives gave a clear view of their impression of the system; "there is way too much litigation, we are nitpicking over things and that is the focus ... when you go to seminars the conversations all tend to revolve around the

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[260] 5 U.S.C. §7101.

[261] GAO, GGD-91-101, Federal Labor Relations a Program in Need of Reform (1991) hereinafter GAO. The GAO surveyed the entire program and interviewed 30 agency, union, and neutral experts on federal labor-management relations to get their views on the state of the program.

[262] *Id* at 3.

case law and how to get things overturned;" "We have become a litigious labor relations program. Some of it out of necessity, but much of it I think is unnecessary and it has cast a sort of pall or an aura that we are more concerned with advocating and posturing ... than [solving] problems;" "What we have is a labor law program not a labor relations program ... I think it is harmful to everybody."[263]

Union officials were equally blunt in their criticism; "The FSLMRS is the federal sector equivalent of the Edsel - the wrong concept at the wrong time. It has spawned endless litigation and engendered adversarial relations ...[the statue] does not promote the resolution of conflict, it inspires it;" "Litigation and minutiae are the norm too often. This is not a pretty picture;" "Labor-management relationships at the activity level are often petty, and marked by personal animosity ... We're on a downhill slide in this program and there is no end in sight."[264]

A review of some of the FLRA decisions issued in 1990 and cited by the GAO in their report show the minutiae the respondents were talking about. Among the issues referred to the FLRA for decision that year: the use of a radio at the worksite, consumption of surplus coffee during breaks, cancellation of the annual picnic, removal of a water cooler, a change in office seating arrangements and a requirement that civilian guards salute the military. Both sides agreed they spent too much time arguing over minutia but seemed to accept that it was part of the system they were given to work with.[265] The respondents also complained that the contract negotiations took too long and resulted in arduous appeals often before serious negotiations occurred. Some examples were negotiations over a day care facility that resulted

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[263] *Id* at 19.
[264] *Id.* at 20.
[265] One agency official said, "The minutiae we have to bargain over is a trade off. It is sort of cathartic in the fact that it lets the unions believed that they are really negotiating something, while from management's standpoint, they are non-important issues. *Id* at 21.

in lengthy litigation and a ten year delay before day care was available, a collective bargaining agreement that took 16 years to renegotiate, including 5 years spent litigating which union should represent the employees, and a ULP resulting from a decision to close a facility and require employees to take one day of annual leave which spawned eight years of litigation and reached the Supreme Court.[266]

A comment from one of the experts interviewed aptly summarized the state of the program: We have never had so many people and agencies spend so much time, blood, sweat, and tears on so little. In other words, I am saying I think it is an awful waste of time and money on very little results." In the decade that followed the delivery of their report to Congress nothing has changed. A recent sampling of issues resolved by the Federal Services Impasse Panel included such items as designation of a restroom as female or unisex,[267] temporary seating assignments for employees without permanent workstations,[268] whether customs inspectors would be identified by their legal last names,[269] and whether a union should receive notice each time the employer decides not to serve light refreshments at a conference.[270]

To accomplish its objectives the program needed strong support. The health of labor-management relations in the federal sector, even in the Executive Order days, was always dependent on the premise that the parties were committed to the practice of collective

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[266] *Id.*
[267] Department of the Army, Eisenhower Army Medical Center, Fort Gordon, Georgia and Local 2017, AFGE, AFL-CIO, Case No. 01 FSIP 180 (November 2, 2001).
[268] Department of the Treasury, Internal Revenue Service, Nashville Tennessee and Chapter 270, NTEU, Case No. 01 FSIP 156 (October 29, 2001).
[269] Department of the Treasury, U.S. Customs Service, Washington, D.C. and National Treasury Employees Union, Case No. 99 FSIP 156 (March 23, 2000).
[270] Social Security Administration and American Federation of Government Employees, AFL-CIO, Case No. 01 FSIP 103 (August 6, 2001).

bargaining as being in the public interest.[271] Though the passage of the Statute guaranteed the right to collectively bargain by law, the program needed strong support from the Executive to reach its objectives because the president sets the tone for labor relations at federal agencies.

President Carter, who accepted bargaining only as a political compromise to get the civil service reforms he wanted, reluctantly endorsed it and was slow to fund the labor-management machinery created by the Statute. President Reagan, who had a strong ideology against federal workers, believing them to be overpaid and under-worked, made appointments and pursued employee relations consistent with his beliefs. Both President Carter and Reagan cast themselves as outsiders who ran against "Washington" and blamed the federal bureaucracy for the countries woes. In part as a result of these attitudes the program, which was in its infancy when President Reagan was elected, was weakened even further and the morale of federal service employees reached a new low.[272]

As the GAO report demonstrated, the system continued to be ineffective and adversarial for the remainder of the decade. President Clinton attempted to reverse this adversarial trend with the issuance of Executive Order 12871 in October 1993. The Executive Order, which established labor-management partnerships in the executive branch created the National Partnership Council to foster partnerships and a more cooperative labor-management relationship. Individual agencies were also ordered to form their own partnerships with employee unions. In order to empower federal employees and their unions it expanded the scope of bargaining under the Statute to include previously permissive items. The majority of both union and management representatives believed the Executive Order improved the labor-

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[271] Sulzner, supra note 256, at 202.
[272] Id.

relations climate.[273] In hindsight, the revocation of the Executive Order by President Bush soon after he took office seems to have set the tone for federal sector labor-management relations in his presidency.

VII. CONCLUSION

The revocation of mandatory partnership councils was a step backward and served no useful purpose. Rather than view partnerships as a partial success and a blueprint for other agencies, the revocation accepts that agency opposition to broad collective bargaining is permissible. Although they did not, and could not, solve all the problems of federal sector bargaining they were a worthwhile experiment that deserved a better chance to succeed. Overtime the partnerships may have softened some of the hostility that is ingrained in certain agencies and prevents a meaningful labor-management relationship. The partnerships thrived at agencies where managers and unions had strong existing relationships, such as the Internal Revenue Service, and were resisted at agencies with poor relations, such as the Immigration and Naturalization Service where both sides viewed them as a waste of time. Even though they are now voluntary the IRS continues to include the NTEU in its decision making process.

The ban on collective bargaining at TSA and the fight over the Homeland Security Department are all spawned more by the failure of bargaining to meet the congressional intent than out of fear of national security. In an Agency so clearly in the public eye after

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[273] Marrick F. Masters & Robert A. Albright, *The Federal Sector Labor Relations Climate Under Executive Order 12871*, 28 J. of Collective Negotiations. 69, 82 (1999) The study, conducted on behalf of the NPC in 1999, found that 60 percent of union representatives and 26 percent of federal agency representatives regarded the situation as uncooperative before the Executive Order was issued. But 60 percent of the union representatives and 45 percent of their management counterparts believed the Executive Order improved labor-management relationships. Overall, 62 percent thought things had improved since the order was issued.

September 11th, the government did not want to get bogged down in the typical minutiae and probably feared the public would not tolerate it were it to become known. If the Agency wanted to retain its ability to reassign people on short notice, or other management prerogatives, it could have done so within a collective bargaining framework. A total prohibition was simply a step backward.

The bargaining ban at the TSA, and the pending legislation modifying the DoD's labor-management program, signal a shift backwards in labor-management relations. Rather than have a unified, coherent labor policy we may be moving back towards the pre-Executive Order stage where each agency determines for itself how much, or how little, bargaining it will allow. It is a schizophrenic policy that seeks to limit the rights of employees while outsourcing their jobs to private contractors whose employees will enjoy more liberal collective bargaining. Ironically, on the same day plans for the new homeland security department were announced the President rescinded the designation of air-traffic controllers as "inherently governmental" employees which opened the doors to privatization of their jobs.[274]

As discussed, the main argument in opposition to collective bargaining was that it would limit the government's flexibility. The argument was that, in the post September 11th world, the government's ability to hire, fire and hold people accountable must be unfettered in agencies with quasi national security functions. Their work was simply too important to be hamstrung by collective bargaining and "silly union work rules." If the administration really believed that, the belief should be reflected in their actions. But their actions in the wake of the attacks of September 11th demonstrate an unwillingness to hold anybody accountable. At the two agencies widely believed to be the most culpable in failing to predict or prevent the

[274] Drinkard, supra note 10.

attacks, the CIA and the FBI,[275] not one person has been replaced, removed, fired, asked to resign, retire or be held responsible.[276] Both are agencies, incidentally, which have never permitted collective bargaining.

The arguments made against federal sector bargaining during the Homeland Security Department debate were similar to those that were historically made against allowing it in government service in the first place. But history shows collective bargaining in the federal sector has not prevented getting the job done. The Statute prevents unions from having any meaningful negative impact on agency function. The fact they may argue for years over the meaningless and trivial and cause frustration for agencies is indicative of weakness not strength.

After looking at the state of the program the real question is, what difference would it make to allow collective bargaining in the TSA and Homeland Security Department. The prohibition on strikes removes the main fear of union-led work stoppages and there are more than adequate safeguards to preserve agency functioning. So why should the government care if employees of the TSA argue about the smoking policy, or seating arrangements, or the color of their uniform? Is that really going to endanger the country?

Allowing bargaining will allow the employees to have a limited voice in the workplace. For every instance of bargaining over smoking or something as seemingly meaningless, there is room for the meaningful cooperation on subjects such as temporary reassignments, flexible work schedules, training opportunities, day care arrangements, etc. Post September 11th, workers at some agencies complained of being treated more like

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[275] William Kristol & Robert Kagan, *Time for an Investigation,* The Weekly Standard, May 27, 2002, at 9; *While America Slept*, N. Y. Times, September 19, 2002, at 34.

[276] 148 Cong. Rec. S094 (September 19, 2002) (statement of Senator John McCain arguing for an independent investigation into the intelligence failures that led to the September 11th attacks).

soldiers than civilians with agencies reassigning them at will and without regard for their responsibilities outside the workplace, and some workers at the TSA have already begun to complain that their managers unregulated ability to hire and fire them is hurting morale and may create a security risk.[277] Of course the Statute allows agencies to take actions such as reassigning workers if necessary, but would allowing the employees to have some input into how those decisions are made really harm the Agency?

In the private sector some management resistance to the voice of the employees is understandable. They may not be loyal to the business or have its best interests at heart. But the federal government should not be as concerned about giving voice to its employees as the employees are about having it. Unlike its counterparts in the private sector the federal government has an advantage in motivating its employees in that every employee of the United States is also a citizen of the United States. They are loyal to the employer, feel they are performing a public service, and want their employer to succeed. Yet, the current approach towards them mimics the historical approach of labor-management relations in the federal sector, which has been expressed by some as "we love you and we will take good care of you, but we don't completely trust you."[278]

The TSA is going to have to deal with employee unions in one way or another. Though the courts may uphold the prohibition on collective bargaining, the TSA can do nothing to prevent its employees from joining a union. The First Amendment rights of association, assembly and freedom of speech guarantee the right of government employees to

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[277] George Merritt, *Airport Screeners blast TSA's Tactics; DIA Workers Say Mismanagement by Feds Hurting Morale, Security,* Denver Post, April 6, 2003, page 33; Shawn Taylor, In the Name of Homeland Security, Chicago Tribune, March 9, 2003, page 5.

[278] Hart, *supra* note 120, at 256.

organize.[279] So the question really is whether they are going to have a good relationship or a poor one.

By denying formal recognition and the right to collectively bargain, the TSA risks an adversarial relationship that could prove more of a nuisance to the Agency than collective bargaining would. The AFGE has begun organizing the airport screeners even though they can't engage in collective bargaining. They can still represent employees at hearings, lobby the Congress on their behalf, and, as they have already begun to do, take the Agency to court. In addition to filing their suit challenging the constitutionality of Loy's order the AFGE recently filed suit in Western District of Pennsylvania on behalf of a TSA employee disciplined for engaging in concerted activity. An adversarial relationship will only encourage the union to push every employee grievance and publicize those, which the Agency loses causing a poor relationship between workers and management and tarnishing the Agency in the public's view.

Federal sector collective bargaining has not fulfilled the Congressional intent. The program, in its current state, causes frustration for all parties involved. That the issue can completely divide the Senate, impact a national election, and delay formation of a federal department demonstrates it isn't working. But the answer is not to go back and recreate the situation as it existed forty years ago. Rather than banning bargaining and unilaterally rewriting the rules to minimize the role of federal sector unions and the employees they represent, federal agencies, and the Congress should be working to fix the program. If the government is going to pursue its goal of being a model employer it needs to take the lead on

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[279] NTEU v. Fasser, 428 F.Supp. 295 (1976); Police Officers' Guild Nat. U. Of Pol. Of. v. Washington, 369 F.Supp. 543 (D.D.C. 1973); United Federation of Postal Clerks v. Blount, 325 F.Supp. 879 (D.D.C. 1971); National Association of Letter Carriers v. Blount, 305 F.Supp. 546 (D.D.C. 1969).

issues of labor-management relations. Rolling back worker protections in the name of flexibility is inconsistent with that goal.